80-394

No. .....

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

HENRY EARL SHRIVER,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

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September, 1980

THE QUESTION PRESENTED FOR REVIEW

Does Due Process require an evidentiary hearing on a state defendant's timely request when he asserts and offers to prove that incriminating evidence the prosecution is attempting to introduce against him should be suppressed because the evidence consists of disclosures made by defendant's lawyer to the prosecution during the negotiations in which, defendant claims, there was a specific agreement that nothing disclosed by him would be used against him should the case go to trial?

PARTIES TO THE PROCEEDING

This is a petition for review of a State criminal prosecution; all parties to the proceeding are listed in the caption.

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DECISION BELOW

The decision of the Oklahoma Court of Criminal Appeals has not yet been officially reported. A copy of the opinion is included in this Petition as Appendix A.

JURISDICTION OF THIS COURT

The date of the judgment sought to be reviewed is May 13, 1980, when the Oklahoma Court of Criminal Appeals authorized its opinion to be filed. The opinion was filed with the Clerk of the Court on May 14, 1980.

A timely Petition for Rehearing was filed; it was denied June 13, 1980 and the order denying same filed June 16, 1980. The Honorable Byron White, Circuit Justice, granted Petitioner's Application for Extension of Time in Which to

File a Petition for Writ of Certiorari on July 30, 1980, extending the time to file such Petition to and including September 11, 1980.

The statutory basis for jurisdiction of this Court to entertain this Petition is 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS PETITION

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ." Amendment XIV, Section 1, United States Constitution.

STATEMENT OF THE CASE

Petitioner (hereafter "Petitioner" or "Shriver") was charged and convicted of the crime of Bribery of a Public Official in violation of 21 O.S. 1971, §381, in the District Court of Oklahoma County, Oklahoma. His punishment was assessed at imprisonment in the Oklahoma County Jail for a period of one (1) year and a fine of Three Thousand Dollars ($3,000.00). Petitioner's appeal was affirmed, two to one, by the Oklahoma Court of Criminal Appeals. Petitioner's bail was continued pending the filing of a timely Petition for Writ of Certiorari.

The thrust of the State's case was that Petitioner had bribed one Roy Melton, Chief Deputy Oklahoma County

Assessor, by giving him $800.00 cash in February, 1977, to lower the ad valorem assessment on Petitioner's home and two commercial buildings in which Petitioner had a financial interest (R. 140-169). Petitioner denied neither the specific transaction nor that he had asked for the assessed valuation to be lowered on the buildings, which was in fact done. The $800.00 transaction was a loan, Petitioner claimed, and to support his allegation, introduced evidence that on two earlier occasions Mr. Melton and his wife borrowed somewhat larger amounts of money from Petitioner, secured by promissory notes and real estate mortgages. Both earlier notes were paid. Melton admitted these transactions (R. 139-40, 198). Petitioner said he did not request a note or mortgage in this instance because of the prompt regularity of payment by Mr. Melton on the earlier occasions. Petitioner denied any other loans to Mr. Melton after February 1977. With respect to the reduced assessment, Petitioner contended, and his testimony was supported by State's witness Roy Melton, that during the tenure of County Assessor Don Wilson, it was a common practice to give local builders and investors tax assessment "breaks" on the first early years of occupancy. This practice occurred because: (1) Mr. Wilson felt the laws allowing similar tax advantages to new, out-of-state industries put local builders at a disadvantage; (2) Mr. Wilson desired the political good will of local builders because he had some rough campaigns for re-election (R. 179-187).

At the trial, the prosecution attempted to introduce into evidence incriminating information concerning a $1,500.00 transaction between Melton and Petitioner. Petitioner through counsel objected, contending the prosecution

learned of this transaction from disclosures during plea negotiations which were not successfully completed. This situation arose in the following manner:

During the testimony of Mr. Melton, the prosecution asked him about other transactions with the Petitioner. Ultimately, over objections, Melton was allowed to testify that he had received a "loan" from Petitioner in May (1977) of $1,500.00, payment of which was made by check (R. 157-167). It is this transaction which is the core issue of this Petition. The entire proceedings of the Trial Court regarding this incident are set forth in Appendix C. Petitioner objected to the introduction of the evidence on the grounds that a material inducement for the disclosure of the $1,-500.00 transaction was the prosecutor's promise that anything disclosed by Petitioner during the plea negotiations would not be used in evidence against him should the matter proceed to trial.

Once Petitioner's counsel (hereafter "Jones") had stated his objection to the Trial Court, the District Attorney, Mr. Coats, countered by stating that he had an independent source for the information, and did not learn of the information through the plea bargaining process. The information, however, had not previously been disclosed to Petitioner as being in the knowledge of the prosecution. Upon the announcement by Mr. Coats that he had an independent source for this information, Jones asked specifically for an evidentiary hearing on the issue and made a detailed offer of proof (Appendix C). He concluded that the only basis for the facts in the knowledge of the prosecution was that which had been learned through plea negotiations. Jones' request for an evidentiary hear-

ing to prove the agreement as contended by him was overruled, and the testimony was admitted into evidence. The prosecution again elicited the same facts, the following day, when the Petitioner took the stand. Petitioner's counsel again objected to the admissibility of the testimony, moved for an evidentiary hearing and after both requests were denied, the testimony was admitted.

On appeal, a divided Oklahoma Court of Criminal Appeals held:[1] (1) evidence of a plea of guilty or offer to plead guilty, or of statements made in connection therewith are not admissible in a criminal action against the person who made the plea offer; (2) the State is not foreclosed from proving material, relevant facts from independent evidence and sources, even though those facts were discussed during plea negotiations; (3) that the testimony in question was admissible even if there was a plea agreement as outlined by defense counsel, and (4) it was unnecessary to reach the issue of whether the court erred in

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[1] Subsequent to Petitioner's trial, Oklahoma adopted in substantial part the Federal Rules of Evidence for Oklahoma State trials, 12 O.S. 1979 Supp. §2101, *et seq.* Section 410 of the Federal Rules which prohibits evidence of withdrawn guilty pleas, offers to plead guilty and facts disclosed during plea negotiations from being introduced into evidence, is identical with the Oklahoma Rule. See 12 O.S. 1979 Supp. §2410. However, the Court of Criminal Appeals held the general principles enunciated in §410 were applicable retroactively to Petitioner's trial because of earlier Court decisions which had adopted the general rule: "... we are persuaded that at the time of trial, even absent this statute, any communication relating to the plea bargaining process was privileged and inadmissible in evidence unless the defendant subsequently entered a plea of guilty which had not been withdrawn. We find this to be the majority view ... (omitting citations)" Appendix A, p. 11.

refusing the Petitioner an evidentiary hearing to prove the agreement. The court did not discuss why the statements complained of were neither incriminating or made in the context of plea bargaining.[2]

REASONS FOR GRANTING THE WRIT

1.

THE ISSUE IS IMPORTANT BECAUSE IT DIRECTLY JEOPARDIZES THE UTILIZATION OF PLEA BARGAINING TO FACILITATE CRIMINAL INVESTIGATIONS AND DISPOSITION OF PENDING CRMINAL CASES.

Guilty pleas arranged through plea bargaining account for the disposition of as many as 95 percent of all criminal cases. ABA Standards Relating to Pleas of Guilty, pp. 1-2 (Approved Draft 1968). A substantial number of these are the result of plea discussions. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report. The Courts (1967). It is readily ap-

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[2] On appeal the State argued that no error was committed by the Trial Court because: (1) due process did not require a hearing; (2) the prosecution was not using any statement made by the defendant, only facts suggested by his counsel (for which the State had an independent source); (3) the facts were not prejudicial (the Oklahoma Court did not adopt this position), and (4) the rule protected only against use of statements and no statements were used. We discuss points 1 and 3 in the statement outlining reasons for the Writ. Points 2 and 4 are obviously without merit for the rule does not apply just to statements or admissions made by a defendant, but cover statements and *admissions* made by an attorney on behalf of his client. See Federal Rules of Criminal Procedure, Rule 11(e). See also, ABA Standards Relating to "The Defense Function", §6.1 (Approved Draft 1971), and *United States* v. *Smith*, 525 F.2d 1017, 1020 (10th Cir. 1975).

parent, therefore, that plea discussions to effect the disposition of criminal cases are of the highest importance in the efficient administration of the criminal justice system, but "if the proceedings during plea bargaining could be introduced as inculpatory statements against the accused, there would not be much plea bargaining. So, as a matter of policy, it is essential that it be considered as privileged." *United States* v. *Smith*, 525 F.2d 1017, at 1020 (10th Cir. 1975).

The decision below jeopardizes two judicially recognized and approved procedures for investigation and resolution of criminal matters: plea bargaining[3] and providing incriminating evidence against other offenders.[4] Why is this so? Because, the court below held that Petitioner was not entitled to an evidentiary hearing, timely made, on his assertion that incriminating evidence was being introduced against him in direct controvention of a promise made during plea bargaining sessions, which centered on Petitioner's evidence and willingness to testify against others, that nothing revealed by him would be used against him if the mat-

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[3] "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining' is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260 (1971).

[4] *Nagelberg* v. *United States*, 377 U.S. 266 (1964); United States Department of Justice, *Principles of Federal Prosecution*, July 28, 1980, Part D,2(a), reprinted 27 Cr.L.Rpt. 3277, 3283. "Finally, a plea bargain may also contribute to the successful prosecution of other, more serious offenders. (omitting citations)." 2 *Weinstein's Evidence, Commentary on Rules of Evidence for the United States Courts and Magistrates*, §410(03), p. 410-27.

ter came to trial. Instead, the Trial Court accepted at face value the prosecutor's oral representation that he had an independent source for the information, an assertion denied by the defense. Allowed to stand, this decision will discourage other putative defendants from candidly discussing their knowledge of criminal activity by others. For those defendants who are seeking only to mitigate the severity of their punishment, they will be less likely to engage in plea negotiations because whatever is revealed can (and will as this case demonstrates) be used against them should the matter proceed to trial. "It is immediately apparent that no defendant or his counsel will pursue [plea bargaining] if the remarks uttered during the course of it are to be admitted in evidence as proof of guilty." *United States* v. *Ross*, 493 F.2d 771, 775 (5th Cir. 1974).

Administratively, the criminal justice system has come to depend upon pleas of guilty and cooperation by one suspect with law enforcement against other suspects with graver offenses; hence, plea discussions. Since an estimated ninety percent of those charged with crime plead guilty, plea bargaining facilitates the effective operation of the criminal justice system, and this Court has so recognized, if the process is "properly administered." *Santobello*, supra, at 260.

Here, it was not properly administered. As we discuss below, the Petitioner made a sufficient offer of proof to justify a hearing: (1) the request was timely; (2) the offer was specific as to names, dates, places, and tangible documents were offered in support of the offer; and (3) if the allegations in the offer were true, the evidence of the $1,500.00 transaction would have been inadmissible. Indeed,

under the Federal Rules of Criminal Procedure, Rule 41(e), a hearing would have been mandatory.

The necessity of a hearing is obvious. The court below recognized clearly that evidence of statements and facts revealed to plea discussions cannot be used against the person who made the plea offer; the Petitioner does not challenge or dispute that the State is not foreclosed from proving material, relevant facts from independent evidence and sources, perhaps even if those same facts were discussed during plea negotiations. The question is how to reconcile these two different assertions when both are advanced during trial. The answer is obvious: An evidentiary hearing must be held by the trier of facts to determine whether the State had, in fact, an independent source for the information. Here, in spite of the detailed offer of proof (Appendix C), the trial judge simply resolved the dispute in favor of the representations of the District Attorney. This he cannot do. A defense attorney and a prosecuting attorney are both officers of the court. When a serious factual issue is in dispute it cannot be resolved upon the unsupported statements of the prosecutor, *United States* v. *Smith,* 495 F.2d 668 (10th Cir. 1974), for "He does not perform a function of the court to any greater extent than his adversary does." *Fleming* v. *Hance,* 94 P.2d 620, 622 (Calif. 1908).

Plea bargaining is to be encouraged. That much is clear. Nothing will discourage plea bargaining more, though, than to permit a situation where, if plea bargaining fails, the defendant is not entitled to a hearing on a claim, adequately supported and timely made, that evidence is being introduced against him which he revealed during plea bargain-

ing, and for which the State had no independent source. The issues are such that if the offer of proof would entitle the defendant to prevail if he established the facts set forth in his offer, the resolution can be made only by an evidentiary hearing and not be oral representations of opposing counsel.

2.

THE FOURTEENTH AMENDMENT GUARANTEES OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES A HEARING.

A motion objecting to the introduction of evidence that raises factual issues cannot be "denied . . . on the basis of the statements of counsel without taking any evidence on the issue." *United States* v. *Smith*, 495 F.2d 668, 669 (10th Cir. 1974). When a hearing is denied, the cause must be remanded. *Smith*, supra.

This Court has made it clear, in interpreting the Due Process Clause of the Fourteenth Amendment that, with rare exceptions, the Trial Court must hold a hearing where there is a serious dispute of fact concerning the admissibility of crucial evidence. This requirement is already present in the Federal Rules of Criminal Procedure because of Rule 41(e). The Court has made the same requirement mandatory for the States in many situations. *Boles* v. *Stevenson*, 379 U.S. 43 (1964) (hearing necessary on issue of voluntariness of confession); *Jennings* v. *Ragen*, 358 U.S. 276 (1959) (habeas corpus hearing required); *Sims* v. *Georgia*, 385 U.S. 538 (1967); *Wilde* v. *Wyoming*, 362 U.S. 607 (1960); *McNeal* v. *Culver*, 365 U.S. 109 (1961) (State prisoner entitled to hearing on his allegation State refused

to appoint counsel as required by law); *Jackson* v. *Denno*, 378 U.S. 368 (1964) (Defendant entitled to hearing on allegation confession physically coerced); *Franks* v. *Delaware*, 438 U.S. 154 (1978) (hearing required on sufficient showing to challenge the veracity of affidavit for search warrant). As the above cases clearly reveal, due process requires a hearing in a number of criminal and quasi-criminal situations where substantial rights of liberty, property or life are threatened. This requirement has even been extended to matters clearly civil. *Armstrong* v. *Manzo*, 380 U.S. 545 (1965) (hearing required before deprivation of parenthood); *Cole* v. *Young*, 351 U.S. 536 (1956) (hearing required before dismissal from employment); *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117 (1926) (accountant's qualification to practice before Board of Tax Appeals can't be revoked without hearing); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957) (hearing required before right to take bar examination denied); *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969) (hearing required before pre-judgment garnishment). *Brown* v. *United States*, 359 U.S. 41 (1959) (hearing required on allegation of criminal contempt committed outside presence of court); *Beard* v. *Stahr*, 370 U.S. 41 (1962) separate opinion (hearing required on military officer's discharge); *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963) (hearing required on charges applicant unfit to become member of bar).

Simply put, the Fourteenth Amendment required that the Petitioner in this circumstance was entitled to a careful consideration and plenary processing of his allegations including a full opportunity for presentation of all of the

relevant facts. His allegations were neither vague nor conclusory, but contained specific factual statements as to the terms under which the plea bargaining was conducted. See *Blackledge* v. *Allison*, 431 U.S. 63 (1977). This Court has recognized that "a State defendant should have the opportunity to have *all issues* which may be determinative of his guilt tried by a State judge or a State jury under appropriate State procedures which conform to the requirements of the Fourteenth Amendment." *Rogers* v. *Richmond*, 365 U.S. 534, 547-548 (1961). This right of the Defendant to have a hearing extends even to where the prosecution claims that it has an independent source for incriminating information which otherwise would be inadmissible because of the manner in which it was obtained. See *Nardone* v. *United States*, 308 U.S. 338, 341 (1939); and *United States* v. *Falley*, 489 F.2d 33, 41 (2d Cir. 1973).

3.

PETITIONER LAID THE NECESSARY PREREQUISITES TO HOLD AN EVIDENTIARY HEARING.

In *Blackledge* v. *Allison*, supra, a habeas corpus matter involving a State prisoner, this Court laid down certain guidelines to determine when an evidentiary hearing was necessary. Although the facts in that case involved an allegation of a different type of violation of due process, nevertheless, the principle is broad enough to cover the instant situation insofar as determining when it is necessary to hold an evidentiary hearing. The teaching of *Blackledge* was that a defendant was entitled to a hearing and a full opportunity for the presentation of relevant facts when his allegations were neither vague nor conclusory, but instead

contained specific factual statements as to the terms of the promise made to him (in this case, the terms and disclosures in the plea bargaining session).

Here, clearly, the Petitioner laid the necessary prerequisites to hold an evidentiary hearing.

1. *The request was timely.* It was not waived. The moment the prosecutor started to raise the issue, the defense counsel approached the bench and made his objections known. His objections were repeated when the matter arose on the second day. They were contained in the Motion for New Trial and they were raised on appeal and indeed raised again in the Petition for Rehearing.

2. *The defense made a detailed offer of proof of what it sought to establish.* That offer, naming specific times, dates, places and even the existence of certain documents, was sufficient, if believed, to prohibit the reception of evidence of the $1,500.00 transaction.

3. *The substance of the offer of proof was not denied.* One of Mr. Coats' assistants who was present during the plea negotiations (Mr. Coats was not present during such negotiations), did not deny the promise that nothing revealed would be used against the Petitioner, and admitted that his memory of what transpired during the plea negotiations was "substantially the same" (Appendix C, p. 5), as that represented by Mr. Jones. Although this assistant, Mr. Laurence, first claimed he couldn't remember any conversation about a specific check for $1,500.00, he amended that to "whether it came up or not, I don't know . . ." (Appendix C, p. 6). Thus, the allegations made by Petitioner's counsel were not directly contradicted by the State at the time of the trial. (After the trial, the State

filed certain affidavits which contradicted the statements made by the prosecutors before the court.) Rather, Mr. Coats merely represented to the court that he was not present when Jones had his conference with Laurence and that he couldn't be bound by Laurence's agreement with Jones. In this connection, Mr. Coats was clearly wrong. See *United States* v. *Carter*, 490 F.2d 1407 (4th Cir. 1974); *United States* v. *Hammerman*, 528 F.2d 326 (4th Cir. 1975). Coats claimed that he learned of the incident from Melton himself, although an affidavit filed after the trial showed that the conversation between Coats and Melton took place after Jones' conversation with Laurence wherein the $1,-500.00 transaction was discussed.

4. *The evidence was incriminating.* The plea bargaining session was initiated to determine whether Petitioner had any evidence that might be helpful against other persons. (Melton himself was also a defendant in another bribery case and the wide-ranging investigation was then under way by State and Federal authorities into the operation of the County Assessor's Office; ultimately, half a dozen arrests were made). Shriver was on trial for one specific charge: an allegation of an $800.00 bribe to Melton. Shriver denied this specific transaction constituted a bribe. However, such did not foreclose the possibility that there might be other occasions where criminal activity might have taken place. Shriver's counsel, Jones, according to the offer of proof, was offering to "de-code" certain transactions, and specifically one in particular as an example of the type of evidence and information that Petitioner Shriver could give if he received favorable consideration in the disposition of his case through a plea to a reduced charge.

Specifically, Petitioner's counsel said:

> . "And I told them that Melton had received from Mr Shriver, as a go-between on several occasions, money paid by check and on one occasion, there was a $1,-500.00 check that was paid, and then I went into the details of that particular transaction, which is at variance with Mr. Melton's testimony today. At that point, after I explained to them, Mr. Acox (a police officer investigating the case), turned to Larry Joplin (Assistant District Attorney in charge of white collar crime investigations) and said, 'Larry' and this is a direct quote, . . .'we've got to talk about this,' end quote. I told them there was more than one $1,500.00 instance . . ." (R. 163, App. C, p. 2).

Jones' offer of proof also contained the statement that Laurence agreed that even if the State knew of the particular transaction Jones was about to reveal ($1,500.00) he, Laurence, agreed not to use it against Shriver at trial. It was this offer of proof that Laurence not only did not reject in his oral representations to the court at the time the matter was raised, but indeed stated that his recollection was "substantially the same" as that of Jones.[5] (Appendix C, p. 5).

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[5] Later, when a Motion for New Trial was filed alleging that the Petitioner was entitled to a new trial because of a violation of the plea agreement discussions, the prosecution filed a series of self-serving affidavits. The prosecution, however, still objected to the request for an evidentiary hearing. The affidavit of Mr. Coats, however, is important in one respect: It clearly demonstrates that Mr. Coats had no knowledge of the $1,500.00 transaction until February 7, 1978, a date after the meeting between Jones and Laurence in which Jones briefed Laurence on the $1,500.00 transaction. That meeting took place on February 3, 1978.

4.

HOW THE PETITIONER WAS PREJUDICED[6]

The test to determine whether this type of testimony introduced was harmless is that it must be harmless beyond a reasonable doubt. *United States* v. *Geders*, 566 F.2d 1227, reversed on other grounds, 585 F.2d 1303 (1978), *cert. den.* 441 U.S. 922 (1979); *Chapman* v. *California*, 386 U.S. 18 (1967). We say that the only way to resolve the question of whether the State had an independent source of knowledge for the $1,500.00 transaction was through an evidentiary hearing. The Court of Criminal Appeals simply avoided the issue by stating that even if everything contained in the offer of proof was true, the evidence was inadmissible. How this can be so, without any explanation.[7] is difficult to perceive, because in fact it cannot be so. If the statements made by Jones in his offer of proof were proven to the satisfaction of the trier of fact after a full evidentiary hearing, no evidence of the $1,500.00 transaction could be admitted.

Certainly there is no question that Mr. Shriver was prejudiced by the introduction of the transaction in several ways.

1. Its introduction revealed yet another financial transaction (for approximately twice the amount for which Pe-

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[6] Its prejudice is apparent from the fact the prosecution itself suggested a cautionary instruction could be given (R. 163). However, no such instruction was given. Moreover, Coats told the Trial Court he would not "persist" in the matter (App. C, p. 4); in fact, he brought it up again during cross-examination of Shriver (R. 320).

[7] In the absence of findings of facts by the Trial Court on the contested issue presented here, the appellate court's unsupported conclusion is not the equivalent of findings of facts. *Beck* v. *Ohio*, 379 U.S. 89, 93 (1964).

titioner was being tried, *i.e.*, $1,500.00 *vs.* $800.00) between Melton and Shriver. Indeed, the prosecution sought to admit it for that very reason (R. 163).

2. The testimony was elicited by the prosecution from its principal witness, Mr. Melton. Presuambly the prosecution felt that the testimony was critical to its case since Melton testified after he had revealed this financial transaction that "his business dealings with the defendant influenced him to use his office to secure reduced assessments for the defendants; and that although similar favors were extended over the years to many people who never loaned him money, the extent of the favors extended to the defendant were greater because of their business dealings . . ." (Opinion of Court of Criminal Appeals, reproduced in Appendix A, pp. 5-6).) Clearly, the $1,500.00 transaction was one which influenced Melton, and the only other transaction (other than the $800.00 one for which defendant was on trial) still open for prosecution under the applicable Oklahoma statute of limitations.

3. Melton testified the $1,500.00 May transaction was by check, whereas the alleged bribe in February of the same year for $800.00 was cash, thus suggesting that a legitimate loan would be extended by check but Shriver would not write a check for a bribe but would pay it by cash.

4. The transaction occurred during a period of time that there was much activity by the mortgage holders of the properties to secure a reduction of assessment (R. 74, 101, 189-190, 191).

When the prosecution was permitted to ask Shriver about the $1,500.00 transaction, Shriver's counsel again objected. The objections were overruled. Shriver did not testify that the $1,500.00 transaction was a loan, when asked by Mr. Coats. Instead, he said simply, "that's what he (Melton) testified to yesterday" (R. 320). Mr. Shriver admitted giving (not lending) $1,500.00 to Melton (R. 320). There was then a confusing question by Coats which Coats took as an admission of Shriver's that the $1,500.00 was a loan, when in fact Shriver was referring to the $800.00 transaction only. Shriver denied that Melton ever paid him back the $1,500.00; Melton said he did (R. 320). Thus, the damage was done. The prosecution had been permitted to inquire on direct examination of its witness concerning the $1,500.00 transaction and on cross-examination of Shriver. The point was a crucial one: one that bolstered the State's case and weakened the defense that regardless of what the $1,500.00 transaction was (for which Shriver was not on trial), he was innocent of the specific charge of bribing Melton for $800.00.

5. The introduction of the transaction was unfair because Shriver's counsel had previously told Laurence that the transaction was evidence of a criminal act. If Shriver denied such on the stand during his testimony, he would be testifying directly contrary to a representation made by his attorney. If on the other hand, he agreed with his attorney, then he was admitting a criminal act.

For the above reasons, it stretches credulity to believe that the introduction and reference to the $1,500.00 transaction was in any way helpful to Shriver's case. It was an

extremely subtle, but nevertheless highly effective, complement and corroboration to the State's case.[8]

CONCLUSION

The Federal Courts have recognized the necessity for a hearing to determine the circumstances surrounding the plea bargain and to determine whether evidence is being introduced in violation of the plea bargaining discussions. See *United States* v. *Robertson*, 582 F.2d 1356, 1366 (5th Cir. 1978). We ask that the States be required to follow the same rules. The Petition should be granted, and the cause returned to the lower court with directions to grant the Petitioner a new trial. Should the State attempt to introduce evidence of the $1,500.00 transaction the Trial Court should hold an evidentiary hearing.

Respectfully submitted,

STEPHEN JONES
(Counsel of Record)
P. O. Box 3339
Enid, Oklahoma 73701
Phone (405) 233-4321

Attorney for Petitioner

September, 1980

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[8] By inference reference was made to the $1,500.00 again in the final closing argument by the prosecution (R. 399).

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that true and correct copies of the foregoing Petition for a Writ of Certiorari were served by placing same in the United States Mail, postage fully prepaid, to all parties required to be served, to-wit: Jan Eric Cartwright, Attorney General of Oklahoma, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this ..... day of September, 1980.

Stephen Jones

APPENDICES

APPENDIX A

FOR PUBLICATION

[Filed May 13, 1980]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

HENRY EARL SHRIVER, Appellant,	)	
-vs-	)	No. F-78-518
THE STATE OF OKLAHOMA, Appellee.	)	

—OPINION—

Appellant, Henry Earl Shriver, hereinafter referred to as defendant, was charged by information in Case No. CRF-77-3144, with the crime of Bribery of a Public Official, in violation of 21 O.S.1971, § 381, in the District Court of Oklahoma County, Oklahoma. The jury found the defendant guilty and assessed his punishment at imprisonment in the Oklahoma County jail for a period of one (1) year and a fine of Three Thousand Dollars ($3,000.00). From this judgment and sentence the defendant appeals.

Joe B. Barnes, the State's first witness, stated that he was the present County Treasurer of Oklahoma County, having assumed office May 1, 1976. He explained that it was the function of the County Assessor to make an estimate of fair market value of each piece of real property within the county and then determine the property's net assessed value, which is generally 20 percent of the former. A tax roll is then prepared which contains the legal description of each property, the owner's name, and the net assessed value. The tax roll is transmitted to the County Treasurer's Office which multiplies the tax rate times the net assessed value to arrive at the tax assessment of each property.

Barnes stated that his predecessor in office for the immediately preceding seven years was Jack Blackwell and that Don Wilson was the County Assessor during this period. Wilson had a policy to permit some people to file a "Complaint of Erroneous Assessment and Petition for Correction" and secure approval of a reduced assessment by the Board of Tax Roll Corrections. Blackwell, as County Treasurer, would then make a refund to the taxpayer. Blackwell would pay a claim for refund that was filed more than one year from the date the tax was paid, although this is contrary to the statute which limits refunds to claims submitted not more than one year from payment of the tax, 68 O.S.1971, § 2479. On cross-examination, the witness testified that during the seven years prior to his assuming office thousands of taxpayers obtained corrections to the tax rolls through this scheme. Further, the witness explained, the issue of the value of a particular property is not among the 17 statutory grounds which authorizes the Board of Tax Roll Corrections to adjust the assessment and tax downward. If the question of value was raised by the owner, the issue must have been presented to the County Equalization Board. Plus during the period in question, Barnes testified, the Board of Tax Roll Corrections did not hold regular meetings as required by statute.

The information alleged that Roy Whittington was the public official who took a bribe of $800.00 from the defendent. In testifying for the State, Roy Melton related that from January, 1967, to August, 1977, he worked in the office of the County Assessor, Don Wilson. He was Chief Appraiser for the first three and a half years and Director of Buiness Personnel for the remainder. Melton first met the defendant in March, 1967, when the defendant came to the Assessor's Office. He was instrumental in securing a reduction in tax assessment on property owned by the defendant at that time, and the two thereafter met periodically in the courthouse cafeteria or in the County Assessor's Office.

The defendant was part owner of an office building located at 4335 N. Classen Boulevard in Oklahoma City. The building permit was issued in May, 1972, and the building was substantially completed in February, 1973. In 1974 Melton assisted the defendant by causing the assessed value of this building to be taken off the tax roll of 1973.[1] The adjustment was made on the ground that the building was not complete as of January 1, 1973. Melton agreed to make the same adjustment on the 1974 tax roll, but for some unexplained reason this was not accomplished. The mortgagee, Pilot Life Insurance Company, paid the taxes on the full assessed value on January 13, 1976, for the 1974 tax year.[2] The life insurance company did not attempt to secure an adjustment in the 1974 valuation. The assessed value of the building was completely taken off the tax roll of 1975.[3] And the land and building were assessed at partial value for 1976 and 1977.[4]

The other office building involved in this proceeding in which the defendant was part owner is situated at 4301 N. Classen Boulevard. The building permit was issued in August, 1973, and the building was completed in May, 1974. The assessed value of the property for 1974 was $7,030.00 and tax was $644.86. In 1975 the assessed value was $93,645.00 and the tax was $8,591.93, which was paid by the mortgagee, Pilot Life Insurance Company, on June 1, 1976. The insurance company attempted to obtain a 1975 tax roll correction which would have eliminated the assessed value

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[1]The 1973 tax roll correction reduced the assessed value from $33,250.00 to $3,000.00 and the tax from $2,989.84 to $269.78.

[2]The 1974 assessed value was $33,250.00; tax paid was $3,050.02.

[3]The 1975 tax roll correction reduced the assessed value from $33,250.00 to $3,000.00 and the tax from $3,050.69 to $275.25.

[4]1976 — assessed value $15,000.00; tax — $1,385.25.
1977 — assessed value $21,250.00; tax — $1,191.06.

of the building, but County Treasurer Joe B. Barnes advised the life insurance company that the claim was not timely filed, as it was not filed within one year from the date the tax was paid. The property was assessed in 1976 and 1977 at $93,645.00, and no attempt was made to reduce this value.

The defendant's residence was completed in June or July of 1975. The assessed value for 1974 and 1975 was $500.00 and the tax was $52.00 for each year. In 1976 the assessed value was $14,240.00 and the tax was $1,488.79. A tax roll correction dated January 7, 1977, and signed by Melton, reduced the 1976 valuation to $2,000.00 and the tax to $209.10.

Melton testified during cross-examination that he had advised the defendant he would cause the valuation of the property at 4335 N. Classen Boulevard to be reduced for 1974, and when this was not done he saw that the valuation of this property was reduced for 1975 and 1976 and reduced the valuation of the defendant's home for 1976.

In 1968 the defendant loaned Melton $2,885.94, which was secured by a promissory note and mortgage signed by Melton and his wife. The loan was used to pay off an indebtedness Melton owed in one C. L. Edmonds. Melton repaid the loan as agreed. In 1969 the defendant loaned Melton $1,200.00, secured by a promissory note and mortgage signed by Melton and his wife. And this loan was repaid as agreed.

Melton testified that the defendant asked him to come by his office in February, 1977. At this meeting, the defendant gave the witness $800.00 as a gift to show his appreciation for Melton's efforts on his behalf. He never repaid the $800.00, nor was he asked to do so. In May, 1977, according to the witness, the defendant gave him $1,500.00 as a loan, which he subsequently repaid.

Toward the conclusion of his appearance, Melton testified that his business dealings with the defendant influ-

enced him to use his office to secure reduced assessments for the defendant; and that although similar favors were extended over the years to many people who never loaned him money, the extent of the favors extended to the defendant were greater because of their business dealings.

The defendant, testifying in his own defense, stated that in February, 1977, he agreed to meet Melton in his office in the Glenn Justice Building at 4335 N. Classen Boulevard. Melton asked for the meeting and came to the office between 10:00 a.m. and 12:00 noon. Melton requested a loan of a little over $2,000.00. Shriver told him he was having business problems and could not do it. Ultimately, Melton reduced his request to $800.00, and the defendant agreed to make the loan. Shriver was not sure if he gave Melton the money at that time by check or in cash. He did state that he did not ask Melton to sign a promisory note because he had in the past always repaid his obligations as agreed. In May or June of that year, the defendant stated, he loaned Melton an additional $1,500.00 which Melton never repaid.

The defendant denied that the various reductions in assessments he secured with Melton's assistance were the result of his having loaned money to Melton or as the result of money paid to Melton. Rather, the defendant maintained that the adjustments were made for him and thousands of other people as the result of official policy of the County Assessor. He stated that while Don Wilson was the County Assessor, the office had developed official policies favoring local real estate developers. These policies had been developed in response to political considerations, economic considerations, and Mr. Wilson's preference for local business developers over out-of-state business trusts. The County Treasurer during that period, Jack Blackwell, also maintained official policies designed to favor local real estate developers and owners.

As County Treasurer, Mr. Blackwell followed a policy of allowing tax refunds to real estate developers whose

property had, up to two years previously, received a downward adjustment in its tax assessment. As the Oklahoma County Assessor, Mr. Wilson followed a liberal policy of permitting local real estate developers various tax breaks in the tax assessment of property under construction. A developer could file a Complaint of Erroneous Assessment and Petition for Correction and if the developer were "credible," the petition for correction was routinely granted and, if owing, a refund made. The result of these office policies was that it was relatively easy for a local developer to obtain a downward adjustment in the tax assessment of property for up to two previous years simply by filing a Complaint of Erroneous Assessment and Petition for Correction.

The defendant's first assignment of error is the court's refusal to give the defendant's requested instructions 24 and 25. Defendant's requested instruction 24[5] covers the misdemeanor of entering into an unlawful agreement with a county assessor to obtain a lower assessment, as provided in 68 O.S.1971, § 2477, to wit:

> "It shall be unlawful for any County Assessor, Deputy County Assessor, member of a County Board of

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[5]Defendant's requested instruction number 24:

"You are further instructed that under the laws of the State of Oklahoma it is unlawful for any county assessor, deputy county assessor, member of a county board of equalization, to enter into any agreement or understanding with the owner or agent of any taxable property whereby such property is to be assessed lower proportionally than other taxable property in the same county, as an inducement to have such property brought into and kept in such county or for any other reason. Any person entering into such unlawful agreement or understanding including the owner or agent of the property involved, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $50.00 nor more than $500.00, or by imprisonment in the county jail for not less than thirty (30) days, nor more than six (6) months, or by both such fine and imprisonment."

Equalization or Board of County Commissioners, or member or duly authorized representative of the Oklahoma Tax Commission or State Board of Equalization, to enter into any agreement or understanding with the owner or agent of any taxable property, whereby such property is to be assessed lower proportionately than other taxable property in the same county, as an inducement to have such property brought into or kept in such county, or for any other reason. Any person entering into any such unlawful agreement or understanding, including the owner or agent of the property involved, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than Fifty Dollars ($50.00), and not more than Five Hundred Dollars ($500.00), or by imprisonment in the county jail for not less than thirty (30) days or more than six (6) months, or by both such fine and imprisonment."

Defendant's requested instruction 25[6] directs the jury to consider whether the defendant was guilty of the misde-

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[6]Defendant's requested instruction number 25:

"If you find beyond a reasonable doubt that the Defendant in the month of February, 1977, in Oklahoma County, Oklahoma, did unlawfully, willfully, and feloniously bribe deputy assessor Roy Melton as defined herein, then you shall find the Defendant guilty of the crime of bribery and shall fix the punishment as defined herein.

"However, if you fail to so find, or if you entertain a reasonable doubt thereof, you shall next consider whether the Defendant is guilty of the crime of agreement or understanding as to lowered assessments as defined herein.

"If you find beyond a reasonable doubt that the Defendant did commit the crime of entering into an agreement or understanding to have the taxes on the property in question lowered proportionally, on the date and place alleged in the information, you shall find him guilty of such offense and fix his punishment by confinement in the

meanor under Section 2477 above, if they failed to find or entertained a reasonable doubt as to the defendant's guilt of bribery as charged.

The general bribery statute under which the defendant was charged is 21 O.S.1971, § 381, which provides as follows:

> "Whoever corruptly gives, offers, or promises to any executive, legislative, county, municipal, judicial, or other public officer, including peace officers and any other law enforcement officer, or any person assuming to act as such officer, after his election or appointment, either before or after he has qualified or has taken his seat, any gift or gratuity whatever, with intent to influence his act, vote, opinion, decision, or judgment on any matter, question, cause, or proceeding which then may be pending, or may by law come or be brought before him in his official capacity, or as a consideration for any speech, work, or service in connection therewith, shall be punished by imprisonment in the State Penitentiary not exceeding five (5) years, or by a fine not exceeding Three Thousand Dollars ($3,000.00) and imprisonment in jail not exceeding one (1) year."

The defendant argues that 68 O.S.1971, § 2477, constitutes a lesser included offense within 21 O.S.1971, § 381, and that he was therefore entitled to the instructions pertaining thereto. We agree with the defendant's authorities to the extent that a jury should be instructed as to lesser included offenses when the evidence warrants. However, we find that Section 2477 of 68 O.S., Revenue and Taxation,

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[6] (Continued)

county jail for not less than thirty (30) days nor more than six (6) months and/or fine of not less than $50.00 nor more than $500.00.

"However, if you fail to so find, or have a reasonable doubt thereof, you shall find the Defendant not guilty."

is not a lesser included offense within the crime of Bribery of a Public Official. It is a separate and distinct offense from the crime charged. We are persuaded that the legislative history and language of Section 2477 limits the statute's application to personal property. The 1910 statute specifically referred to personal property. Although the statute in its present form does not specifically refer to personal property, it is substantially the same as the old law. The current statute makes it a crime for a county assessor to enter into an agreement with the owner or agent of taxable property to tax such property lower proportionately than other taxable property in the county *"as an inducement to have such property brought into or kept in such county."* (Emphasis added). The emphasized language implicitly limits the agreement or understanding to the taxation of personal property. Therefore, we find the defendant's first assignment of error to be without merit.

The defendant's second assignment of error is the denial of the defendant's request for an evidentiary hearing to prove an agreement by the District Attorney made during pretrial plea negotiations that no reference would be made by the prosecutor to the $1,500.00 loan.

Immediately following Melton's account of the $800.00 gift, the District Attorney asked the witness if he had any other personal dealings with the defendant after that time. The witness stated that in May, 1977, he received $1,500.00 as a loan from the defendant. When the prosecutor asked the witness to relate the circumstances, the defendant's attorney approached the bench and a conference in chambers ensued.[7] Upon conclusion of the conference, the court

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[7]Direct examination of Melton by District Attorney Andrew M. Coats:

"Q. All right, sir. Did you have any further personal dealings with Mr. Shriver after that time?

"A. Well, there were several times he came down to the office and talked to Don and — but shortly after that, I say shortly after, I believe sometime in May — he gave me a loan of $1,500.00.

overruled the defendant's motion for a mistrial and denied a defense request for an evidentiary hearing. During conference in chambers, Stephen Jones, the defendant's attorney, told the court of a meeting prior to trial in the office of Assistant District Attorney James P. Laurence. Present, in addition to Laurence, was Assistant District Attorney Larry E. Joplin and Oklahoma City Police Department Sergeant Charles Acox. Jones told the court that at this meeting he stated his client was willing to plead to two misdemeanor charges and, in return, he would furnish information of transactions in which money was paid to persons in the County Assessor's Office. In particular, according to Jones, he mentioned $1,500.00 paid to Melton by the defendant, and was acting as a go-between for others. The prosecutors indicated they were interested and would be in touch. Two days later, Acox and Oklahoma City Police Department Lieutenant Kennth R. Smith, met with Jones and told him they had authority to make arrangements in the event there was a plea bargain and, according to Jones, it was agreed that no reference would be made at trial of the $1,500.00 transaction, whether or not a plea bargain was struct. Subsequently, plea negotiations were terminated.

District Attorney Andrew M. Coats told the judge in chambers that he did not learn of this particular transaction from his staff or from those in the Police Department but rather from Melton. Mr. Laurence told the judge that during his discussions with Mr. Jones he did not remember a specific amount being mentioned but rather a

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[7] (Continued)

"Q. All right. So, you went back to him sometime in May and borrowed some more money from him, is that right?

"A. That's correct.

"Q. How did that come about?

"MR. JONES: Excuse me, just a moment. May we approach the bench?

discussion of a course of conduct. The judge then denied the defense request for an evidentiary hearing to prove the agreement as contended by Mr. Jones, and ruled the testimoney admissible.[8]

Title 12 O.S.Supp.1978, § 2410, provides that evidence of a plea of guilty or offer to plead guilty, or of statements made in connection therewith, are not admissible in a criminal action against the person who made the plea or offer. But Section 2410 became effective October 1, 1970, subsequent to the trial below. However, we are persuaded that at the time of trial, even absent this statute, any communication relating to the plea bargaining process was privileged and inadmissible in evidence unless the defendant subsequently entered a plea of guilty which had not been withdrawn. We find this to be the majority view. *Moulder* v. *State*, 154 Ind.App. 248, 289 N.E.2d 522, 59 A.L.R.3d 432 (1972); Annot. Admissibility of Defense Communications Made in Connection With Plea Bargaining, 59 A.L.R.3d 441; A.B.A. Standards for Criminal Justice, Standards Relating to Pleas of Guilty, 3.1. See also *State ex rel. Young* v. *Warren*, Okl.Cr., 536 P.2d 965 (1975), which held that incriminating statements made in connection with invalid

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[8]Testimony as to the $1,500.00 loan concluded with the following exchange between Melton and the District Attorney:

"THE COURT: All right. You may proceed.

"MR. COATS: Thank you, your Honor.

"Q. (Mr. Coats continuing) Mr. Melton, you had testified about some money you borrowed in 1977, in May or something of that year. Did you pay that money back to Mr. Shriver?

"A. Yes, sir, I did.

"Q. All right. Did you ever pay back the $800.00 that was given you in February of '77?

"A. No, sir, I never did.

"Q. Were you ever asked for it?

"A. No, sir."

plea bargaining were inadmissible against the person making them.

But we do not view the testimony elicited from Melton, the State's witness, as coming within this rule. As we view the testimony, the State was attempting to establish whether the defendant had any personal dealings with the witness subsequent to the meeting of February, 1977. We are of the opinion and so hold that the State is not foreclosed from proving material, relevant facts from independent evidence and sources, even though those facts were discussed during plea negotiations. We find the testimony in question was admissible even if there was a plea agreement as outlined by defense counsel. It is therefore unnecessary to reach the issue of whether the court erred in refusing the defendant an evidentiary hearing to prove the agreement, and we find the defendant's second assignment of error to be without merit.

After the defendant took the stand to testify in his own behalf, the District Attorney on cross-examination asked him if he had loaned Melton any more money following the $800.00 payment. Over defense objection, the District Attorney was permitted to continue this line of inquiry.[9]

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[9]Cross-examination of the defendant by the District Attorney:

"Q. Now, you loan him some money then later in the year, in '77?

"A. That's what he testified to yesterday.

"Q. I'm asking you. Did you give him some more money later than May or June of that year?

"MR. JONES: If the Court please, to which we object for the same reasons stated yesterday.

"THE COURT: Objection overruled.

"A (By the Witness) Yes, I did.

"Q. All right, sir. And, in what month?

"A. I believe it was in May or June.

We find the ruling of the trial court to be correct, since a defendant who elects to take the stand in his own behalf does so subject to the rights of cross-examination by the prosecution. *Zackery* v. *State*, Okl.Cr., 572 P.2d 580 (1977).

The third assignment of error concerns the court's refusal to grant a suspended sentence in view of all the circumstances. In essence, the defendant complains the judge based his decision on the nature of the crime for which the defendant was convicted and did not consider the defendant's application for a suspended sentence on its merits. The defendant cites *Jones* v. *State*, Okl.Cr., 557 P.2d 447 (1976), where the nature of the crime charged was the sole ground for denial of an application for a suspended sentence; *Boles* v. *State*, Okl.Cr., 497 P.2d 449 (1972), where the nature of the crime charged was the sole ground for denial of an application for a suspended sentence; and *Gillespie* v. *State*, Okl.Cr., 355 P.2d 451 (1960), where an application for a suspended sentence was refused solely because the defendant had demanded a jury trial.

The transcript of the proceedings at which the defendant was sentenced discloses that the court, in denying the application for a suspended sentence and imposing its judgment and sentence, considered (1) the pretrial sentence report which recommended probation under community

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[9] (Continued)

"Q. All right, sir. Did you give him any more money during the rest of the year?

"A. No, sir. I didn't give it to him, I loaned it to him.

"Q. This was another loan?

"A. Yes.

"Q. Has that been paid back?

"A. No, sir.

"Q. If Mr. Melton's testimony was that he did pay it back, is he in error about this?

"A. Mr. Melton has not paid the $1,500.00 back."

supervision; (2) the approximately 25 letters written to the court on behalf of the defendant; (3) the sentence in another case involving the bribery of a public official in the Oklahoma County Assessor's Office in which the defendant received a suspended sentence upon a plea of guilty; (4) the nature of the crime charged; (5) the sentence recommended by the jury; (6) the relative leniency of the sentence since the maximum is five years' imprisonment, and (7) the deterrent effect of imposing the recommended sentence.

It has often been recognized by this Court that suspension or deferral of a sentence is a matter of grace, to be granted or denied by the trial court in the exercise of its sound discretion. *Cavaness* v. *State*, Okl.Cr., 581 P.2d 475 (1978). Moreover, this Court will not interfere with the trial court's discretion unless there is a clear abuse of such discretion. *Hamilton* v. *State*, Okl.Cr., 481 P.2d 471 (1971). We find that the cases relied upon by the defendant are clearly distinguishable from the instant case and that the trial court in this case did not abuse its discretion in rejecting the defendant's application for a suspended sentence, and in adopting the jury's recommended sentence as the judgment and sentence of the court. Accordingly, we find that the defendant's third assignment of error is without merit.

The defendant's fourth assignment of error is the ruling of the examining magistrate binding the defendant over for trial, as the State failed to prove there was probable cause to believe the defendant committed the crime of bribery of a public official. The State is not required at preliminary hearing to present evidence which would be sufficient to convict at trial, and there is a presumption that the State will strengthen its evidence at trial. *Turner* v. *State*, Okl.Cr., 549 P.2d 1346 (1976). When there is competent evidence in the record from which the magistrate, as a trier of fact, could reasonably conclude that there was probable cause to believe a crime was committed and that

defendant committed it, the reviewing court will not interfere with the determination of the finder of fact. *Tabor* v. *State*, Okl.Cr., 582 P.2d 1323 (1978); *Jones* v. *State*, Okl.Cr., 557 P.2d 447 (1976). After carefully reviewing the preliminary transcript in the instant case, it is our opinion that the evidence presented by the State was sufficient to bind the defendant over for trial. We, therefore, find the defendant's fourth assignment of error to be without merit.

The fifth assignment of error is the denial of defendant's motion for judgment notwithstanding the verdict, as the State failed to prove all elements essential to establish the offense charged. Specifically, the defendant argues that proof of a gift given or offered for past efforts does not constitute corrupt giving or bribery. There must be, according to the defendant, a showing that the gift influenced official acts in a prospective, rather than a retrospective, fashion. In addition, he contends that there was no matter in which the defendant was involved which was pending in the Assessor's Office at the time the defendant gave $800.00 to Melton.

The elements of Bribery of a Public Official are: (1) the corrupt giving (2) of any gift or gratuity (3) to a public official (4) with the intent to influence his official act (5) on any matter which may be pending or which may come before the official.

The court instructed the jury that the term "corruptly" imports a wrongful design to acquire some pecuniary or other advantage to the person guilty of the act or omission referred to.[10] The court instructed the jury that the term "bribe" signifies any money, goods, right in action, property, thing of value or advantage, present or prospective, or any promise or undertaking asked, given or accepted, with a corrupt intent to influence unlawfully the person to whom it was given, in his action, vote or opinion, in

[10]Court's Instruction No. 5; 21 O.S.1971, § 94.

any pubic or official capacity.[11] The jury was instructed that the loan of money to a public official, if made corruptly and with the intent to influence his act, vote, decision, opinion or judgment is sufficient to constitute a bribe. This is in accordance with *Handley* v. *State*, 69 Okl.Cr. 321, 102 P.2d 947 (1940), wherein we held that anything may serve as a "bribe" so long as it is of sufficient value in the eyes of the person bribed to influence his official conduct.

We find that a gift or gratuity corruptly given to a public official may be a bribe whether given before or after the fact. And we find there was competent evidence from which the jury could conclude that the $800.00 constituted bribery of a public official.[12] Therefore, we find the defendant's fifth assignment of error to be without merit.

It is therefore our opinion that the defendant received a fair and impartial trial before a jury, that no substantial right of the defendant was prejudiced, and that the judgment and sentence appealed from should be, and the same is, hereby, *AFFIRMED*.

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[11]Court's Instruction No. 6; 21 O.S.1971, § 97.

[12]Cross-examination of Melton by the defendant's attorney, Stephen Jones:

"Q. After Mr. Shriver, according to your testimony, gave you this $800.00 in February of 1977, did you do anything for him in your official capacity?

"A. In '77?

"Q. Yes, sir.

"A. I was still trying to work to get those refunds, and at that time I suggested to Mr. Shriver to visit Mr. Wilson."

AN APPEAL FROM THE DISTRICT COURT,
OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE JACK R. PARR, JUDGE

HENRY EARL SHRIVER, appellant, was convicted of the offense of Bribery of a Public Official; was sentenced to one (1) year in the County jaid and assessed a fine of Three Thousand Dollars ($3,000.00), and appeals. AFFIRMED.

STEPHEN JONES,
ENID, OKLAHOMA,
Attorney for Appellant,

JAN ERIC CARTWRIGHT,
ATTORNEY GENERAL,
DANNY E. SHADID, ASST.ATTY.GEN.,
Attorneys for Appellee.

OPINION BY BUSSEY, J.
CORNISH, P. J., CONCURS
BRETT, J., DISSENTS

[Caption Omitted in Printing]

ORDER CORRECTING OPINION

It has been called to the attention of the Court that an error appears on the second page of the Court's opinion in the case of *Shriver* v. *State,* Okl.Cr., F-78-518, filed the 13th day of May, 1980.

It is therefore the Order of this Court that the name "Whittington" be stricken from the first sentence of the first full paragraph on page two, and the name "Melton" be inserted in place therefore.

WITNESS OUR HANDS, and the Seal of this Court, this *19th* day of May, 1980.

(s) *Tom R. Cornish*
TOM R. CORNISH, PRESIDING JUDGE

(s) *Tom Brett*
TOM BRETT, JUDGE

(s) *Hez J. Bussey*
HEZ J. BUSSEY

ATTEST:

(s) *Ross N. Lillard, Jr.*
CLERK

APPENDIX B

[Filed June 16, 1980]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

HENRY EARL SHRIVER, Appellant,	)	
-vs-	)	No. F-78-518
THE STATE OF OKLAHOMA, Appellee.	)	

ORDER DENYING PETITION FOR REHEARING, CONTINUING PETITIONER'S BAIL AND STAYING THE MANDATE

A petition for rehearing has been filed in the above styled and numbered cause. However, being fully advised in the premises, it is the order of this Court that the petition be denied.

It is the further order of this Court that the mandate not issue and that Petitioner's present bail be continued, pending the filing of a timely application for Writ of Certiorari to the United States Supreme Court.

WITNESS OUR HANDS, and the Seal of this Court, this *13th* day of June, 1980.

(s) *Tom R. Cornish*
TOM R. CORNISH, PRESIDING JUDGE

(s) *Hez J. Bussey*
HEZ J. BUSSEY, JUDGE

ATTEST:

(s) *Ross N. Lillard, Jr.*
CLERK

APPENDIX C

Transcript of Procedings in Trial Court with regard to Petitioner's offer of proof.

MR. JONES: Your Honor, at this time I'm going to move for a mistrial of the jury trial on the grounds that the District Attorney's Office, by introduction of the question of the $1,500.00 had violated an express understanding that I had with Mr. Jim Laurence and Mr. Larry Joplin in the presence of Police Detective Charles Acox, and the background of that motion is that on Friday, February 3rd of 1978, I met with Mr. Laurence in his office. Mr. Joplin was present and Mr. Acox was present, and we were discussing various aspects of this trial, and among the things we discussed were some very sensitive plea negotiations. I advised them of my willingness to enter a plea to two misdemeanors in return for complete and total cooperation by him with some Federal and State investigations concerning this matter. We got into a discussion of what Mr. Shriver knew and what he could deliver and so forth, and I had secured favors from Mr. Wilson's office and could quote, decode, close quote, the manner in which this was done, and Mr. Laurence asked who Mr. Shriver could give them to begin with, and I said, "Don Wilson," and I explained that Mr. Melton had not been forthcoming and then either Mr. Laurence or Mr. Joplin asked what specific information Mr. Shriver might be willing to give, and I told him I had something specifically in mind that I could tell them but I would not tell them unless it was with the assurance that it would not be brought in trial or referred to in any way and that no other use would be made of the information.

There was an exchange of glances between Laurence and Joplin, and after that Joplin said, "All right, you have our word," and I said, "You mean your word in that it would not be used in trial, won't be referred to and no other use will be made of it?" And he said, "Right, right," and then Mr. Laurence said, "Maybe it is something I al-

ready know," and I said, "If that's the case and if I tell you now, you can't use it," and he said, "Yes, that's okay." And I told them that Mr. Melton had received from Mr. Shriver, as a go-between on several occasions, money paid by check and on one occasion, there was a $1,500.00 check that was paid and then I went into the details of that particular circumstance as to what it is, which is at variance with Mr. Melton's testimony today. At that point, after I explained to them, Mr. Acox turned to Larry Joplin and said, "Larry," —and this is a direct quote—"we've got to talk about this," end quote. I then told them there was more than just one $1,500.00 instance, but that the others were part of the same transaction. They said they understood and would be in touch with me. Before I left, I told Acox where I could be reached on Sunday night, and he again told me and said to Larry Joplin, "Larry, we need to talk about this."

On Sunday night, Mr. Acox and Mr. Smith came to my hotel room, represented to me that they had authority from the District Attorney's Office to discuss some very sensitive arrangements that might be undertaken in the event there was a plea bargain. We again discussed this question, this $1,500.00, and the check was shown to them at that time and we discussed things that perhaps I should not elaborate on now, but let us say we had some very serious and frank discussions. We agreed that no public reference would be made to those plea negotiations or to anything like that and that since got in the Oklahoma Journal and on Monday or Tuesday, and I guess it was Tuesday, no, Monday early afternoon, I advised Mr. Acox we could not go through with what was intended. We would not go through, put it that way, and on Tuesday morning I advised Mr. Laurence.

My position is that I dealt with one of the two prosecutors in this case and Mr. Joplin and that I had a specific understanding with them that no reference would be made to the $1,500.00, and now it has come up. I do not think it can be cured by an instruction to the jury to disregard it

because he had already testified that it came at a time, approximately the same period of time when Mr. Wilson was making or writing a letter that would be introduced into evidence, and I'm sure Mr. Coats asked the question in good faith. I assume he did. I don't have any evidence that he didn't but the fact of the matter is that I dealt with a co-prosecutor, Mr. Laurence, and surely he knows that and certainly Mr. Joplin knew, and I would like to ask for an evidentiary hearing on it and to present testimony on it and to substantiate that, and I want to ask for a mistrial.

THE COURT: Alright. What does the District Attorney say?

MR. COATS: Well, Your Honor, to again inndulge in some history, as Mr. Jones did, my first knowledge of this matter came in a discussion I had with Mr. Melton on Thursday of this week when in concluding discussion with him about this matter, I said, "Now, what instances have you dealt with Mr. Shriver?" And he said, "I borrowed money early in '69. He gave me the money in February of '77 and I borrowed money again from him in May of '77." The only knowledge I ever had of any of this came from Mr. Melton himself in conference with him, and I think his lawyer, Howard S. Wisdom. I don't even believe at that point Mr. Laurence was there. I was not privy or involved in any of these negotiations they discussed earlier. But, that aside, it seems to me that we have a whole different situation here where the logical question that I must ask from a witness who tells me and tells the Court and jury what his answer is, is something that couldn't be excluded properly from evidence because of some agreement that they have with counsel about some matters in which I have no knowledge.

Now it seems to me that the evidence is proper and the sense that it shows the course of dealings between these two parties and it seems to me that the jury should have the benefit of knowing what what their course of deal-

ings were, and it is admissible, I think, under the exceptions to the limitation of one specific act because of the series of dealings involved. I do not feel it's necessary for us to persist in it. If the Court feels that the evidence is improper, then certainly an instruction by the Court would take care of it, although it seems to me that on reflection here and as I listen to Mr. Jones, that the negotiations that he talked about fell through, that I learned of the evidence in a way not connected, in any way connected with the deals with Mr. Joplin and Mr. Laurence, but rather through my dealings with the witness who was there, and that the jury is entitled to know the entire scope of their dealings together. He's entitled to cross-examine him from whatever information he has. He obviously knows more about it than I do and he can ask the witness about it in court if he wants to. We would certainly feel that a Motion for Mistrial would be improper. This case is still being well and fairly tried, and if anything, this evidence, it seems to me, helps the defense more than it helps the prosecution. And I might say that it was invited and the reason I got into it was because at preliminary hearing, Mr. Jones had specifically asked the witness about their previous dealings and had produced the note of their dealings and in fact mentioned that same thing in his opening statement this morning and told the jury that on many occasions the witness had borrowed money from Mr. Shriver, and that's already in his statement and already in the record, and this is certainly — we didn't attempt to prove many occasions, but we attempted to prove two and one gift. So, that if anything is required at all, it seems to me simply an intruction of the Court to disregard, although the Defendant is the one that brought in the question of these loans in the first instance, and it seems to be proper evidence.

MR. JONES: Your Honor, may I respond just briefly?

THE COURT: Sure.

MR. JONES: First of all, I'm going to leave aside the question of whether it's proper evidence. I don't think that's the issue. There are many things that may be proper evidence that for one reason or another are not brought in. *The question is, did I have an understanding with the District Attorney's Office that no reference would be made to this in anyway during this trial, and I offer that I had such an understanding, and I believe that if Mr. Laurence and Mr. Joplin and Acox were to testify under oath, they would confirm that.* The fact that Mr. Coats may have learned about independently, if that is in fact the case, does not alter that agreement, nor does the fact that the plea negotiations fell through, alter — because that was one of the things we were discussing as to what could be done if he went about it. There was no understanding that if the plea negotiations fell through, they could refer to it, because obviously if that had been the understanding, I never would have mentioned it to begin with.

Now, I have not invited this. I have made no statements that there were any previous transactions after February '77. The only thing that I made reference were two earlier notes and mortgages, one in '68 and one in '69, and some dealings between them in February of 1977. And, I just — I cannot understand how the District Attorney's Office can turn back on that negotiation now as though that conversation never took place. I renew my request for a mistrial. I renew my request for an evidentiary hearing to establish this point.

THE COURT: District Attorney have any response?

MR. LAURENCE: Your Honor, the conversation took place, as I recall, the conversation with Mr. Jones is substantially the same. I don't remember the amount having been talked about. I remember a discussion of a course of conduct. Checks is what I remember, and the procedure. I was also aware that Mr. Melton had said that he had borrowed the money in May of this year to recoup a tax title or tax deed

to some property in Canadian County and did not connect the two, one with the other. The tax deed, the tax deed situation, being something that was very easy to check as far as contacting the Canadian County people and for specific purpose, would be something that you would want to approach someone to borrow money. I did not connect the two. I don't remember the term $1,500.00 or May at the time we talked. I just remember the course of conduct. Whether it came up or not, I don't know. I never connected the two as being the parts of the same transaction. I certainly wouldn't agree not to use any evidence of the loans which in the preliminary hearing transcript appears,[8] and Mr. Jones had evidence of several and he referred to another one, I believe, today in addition to the one he introduced at preliminary hearing.

MR. JONES: There was no reference at the preliminary to this transaction.

MR. LAURENCE: Now, not this one but the one in '67, and there were references to other loan transactions. So, it seemed like it was part and parcel with that transaction and would be something that would have been introduced by Mr. Jones to attempt to impeach the witness.

MR. JONES: My evidence and my recollection would be that I specifically named the $1,500.00 check. In fact, at the one time even showed it to Mr. Acox as a part of the overall dicussions we were having. (pp. 159-167).

Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-394

In the Supreme Court of the United States

OCTOBER TERM, 1980

HENRY EARL SHRIVER,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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October, 1980

ISSUES PRESENTED

1. Whether a claim that the prosecutor in a state criminal trial violated an alleged promise of his assistants during plea negotiations not to use certain matters discussed therein presents a substantial federal question where the evidence in question supported petitioner's theory of defense?

2. Whether petitioner's claim that the prosecutor violated an alleged promise of his assistants during plea negotiations necessitated an evidentiary hearing beyond the in chambers hearing held before the trial judge?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

COMES NOW the State of Oklahoma, by and through its attorneys, Jan Eric Cartwright, Attorney General of the State of Oklahoma, and Danny K. Shadid, Assistant Attorney General, and for Answer to the Petition for Writ of Certiorari submits to this Honorable Court the following brief in opposition thereto.

JURISDICTION

Petitioner seeks review by way of Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals, pursuant to 28 U.S.C. §1257(3). On May 13, 1980, the aforesaid court issued its opinion affirming petitioner's convic-

tion in the District Court of Oklahoma County, Oklahoma, Case No. F-78-518. Petitioner now seeks direct review of the Oklahoma Court of Criminal Appeals' decision.

STATEMENT OF THE CASE

Petitioner, Henry Earl Shriver, was charged by Information in Case No. CRF-77-3144 with the crime of Bribery of a Public Official, pursuant to Okla.Stat. tit. 21, § 381 (1971) in the District Court of Oklahoma County, Oklahoma. Petitioner was tried by jury and represented by counsel. The jury found petitioner guilty and punishment was set at imprisonment in the Oklahoma County Jail for a period of one (1) year and a fine of Three Thousand ($3,000.00) Dollars. Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals which affirmed petitioner's conviction in an opinion rendered on May 13, 1980. Petitioner now seeks review by this Court by means of his Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

Petitioner was charged with bribing a Mr. Roy Melton, former Deputy County Assessor for Oklahoma County. Specifically, petitioner was accused of paying Melton Eight Hundred ($800.00) Dollars in February, 1977, in return for a reduction in ad valorem taxes on his home and two commercial buildings. Petitioner acknowledged the transaction but claimed that it was merely one of several loans that petitioner had made to Melton over a period of years dating back to 1968. The evidence showed that, in fact, ad valorem taxes on petitioner's real estate holdings had been reduced during the years 1974, 1975, and 1976.

During the trial, the prosecution attempted to introduce testimony regarding a subsequent Fifteen Hundred ($1,500.00) Dollar loan from petitioner to Melton in May or June, 1977. Petitioner objected and an *in camera* hearing was held. While in chambers, petitioner objected to the introduction of such evidence on the ground that the District Attorney's assistants had, within the few days preceding trial, been involved in plea negotiations with petitioner's counsel. According to petitioner, a meeting was held on Friday, February 3, 1977, with Assistant District Attorneys Jim Laurence and Larry Joplin, and Police Detective Charles Acox. Petitioner's counsel told the court that the prosecutors promised that nothing divulged during the negotiation session would be used against petitioner. During that session there was reference to the subsequent $1,500.00 transaction, counsel told the court.

Counsel went on to explain that the following Sunday, February 5, 1977, a second meeting was held with Detective Acox and Detective Kenneth Smith. Again, the $1,-500.00 transaction was discussed, according to counsel. The next day, plea negotiations were terminated.

In response, District Attorney Andrew Coats told the court that he was not a party to any such agreement and that he learned of the $1,500.00 transaction independently from Roy Melton. Mr. Laurence added that he did not recall discussing any specific transaction involving a dollar amount, but rather, only an overall course of conduct. To avoid unnecessary duplication, respondent would cite the Court to Appendix C of petitioner's Petition for a transcription of the pertinent portion of the *in camera* hearing. Additionally, upon the petitioner's Motion for New Trial,

affidavits of all state officials involved or remotely involved were submitted to the trial court. The officers denied absolutely that any agreement was made regarding the disclosure of the $1,500.00 loan. The affidavits are attached hereto as an Appendix.

Upon conclusion of the hearing, petitioner's objection was overruled and the evidence was admitted via the testimony of Roy Melton. The next day, petitioner acknowledged the $1,500.00 transaction on cross-examination by the District Attorney. At no time were there any references to the plea negotiations. Neither were any statements made by petitioner personally or through counsel ever admitted against petitioner.

The Oklahoma Court of Criminal Appeals, in affirming petitioner's conviction, held that (1) the State is not precluded "from proving material, relevant facts from independent evidence and sources, even though those facts were discussed during plea negotiations"; and (2) that the testimony objected to by petitioner was admissible regardless of the plea negotiations. In view of this holding, the Court of Criminal Appeals did not reach the question of whether an evidentiary hearing was necessary. Again, for purposes of avoiding unnecessary duplication, respondent would cite the Court to Appendix A of petitioner's Petition for reference to the opinion handed down by the Oklahoma Court of Criminal Appeals.

ARGUMENT

I. A CLAIM THAT THE PROSECUTOR IN A STATE CRIMINAL TRIAL VIOLATED AN ALLEGED PROMISE OF HIS ASSISTANTS DURING PLEA NEGOTIATIONS NOT TO USE CERTAIN MATTERS DISCUSSED THEREIN, DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION WHERE THE EVIDENCE IN QUESTION SUPPORTED PETITIONER'S THEORY OF DEFENSE AND, THEREFORE, COULD NOT HAVE BEEN UNFAIRLY PREJUDICIAL.

Petitioner seeks review by this Court upon a claim that he was denied due process under the Fourteenth Amendment of the United States Constitution. Respondent submits that the Petition should be denied, initially, for lack of a substantial federal question. Rule 19 of the Supreme Court Rules provides in pertinent part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

The Court has recognized this provision as forming the basis for granting writs of certiorari. *See Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Respondent submits that, in light of the facts of this case, there exists no substantial question.

In the present case, petitioner claims a lack of due process as a result of the trial court refusing to hold an "evidentiary" hearing concerning the alleged disclosures and promises made during plea negotiations. Respondent contends, however, that the trial court held a sufficient hearing. The record reveals that upon petitioner's objec-

tion to any reference to the $1,500.00 loan, an *in camera* hearing was held. The trial court heard a rendition of the pertinent facts regarding the plea negotiations from both sides. Moreover, the situation herein is somewhat unique in that three of the most crucial witnesses who would have testified in an "evidentiary" hearing, *i.e.*, District Attorney Andrew Coats, Assistant District Attorney James Laurence, and defense counsel Stephen Jones, were all present at the *in camera* hearing. All basically told their versions of what happened and how the $1,500.00 loan came to light. As officers of the court, there is no reason to believe that they would have told the court anything different if they had formally "testified." Respondent submits that the trial court conducted a sufficient inquiry into the question presented at trial and that petitioner has failed to show that anything more would have been more effective. For all intents and purposes, petitioner was given his hearing.

Furthermore, respondent submits that the evidence of which petitioner now complains could not have been prejudicial in that, if anything, it supported petitioner's theory of defense. Throughout the trial, petitioner attempted to show that he had routinely made loans to Roy Melton over a period of ten years. Evidence that defendant had made a loan of Fifteen Hundred ($1,500.00) Dollars to Roy Melton in May or June, 1977, simply paralleled petitioner's own evidence and theory of the case. It could in no way have prejudiced petitioner. Absent a showing of substantial prejudice, certiorari should be denied.

Respondent submits that petitioner has failed to show that the inquiry conducted by the trial court was not sufficient. In any event, the evidence in question could have

only substantiated petitioner's theory of the case; petitioner has certainly shown no prejudice from the admission of such evidence.

II. PETITIONER'S CLAIM THAT THE PROSECUTOR VIOLATED AN ALLEGED PROMISE OF HIS ASSISTANTS DURING PLEA NEGOTIATIONS DID NOT NECESSITATE AN EVIDENTIARY HEARING BEYOND THE IN CHAMBERS HEARING HELD BEFORE THE TRIAL JUDGE.

Initially, respondent would point out that the pertinent rule applicable to this case is that only *statements* made by a defendant during the course of plea negotiations cannot be used against him at trial. Petitioner's own authorities support this view. *See United States* v. *Smith,* 525 F.2d 1017 (10th Cir. 1975); *United States* v. *Ross,* 493 F.2d 771 (5th Cir. 1974). However, there is nothing preventing the State from proving, by means of other evidence or sources, the underlying questions of fact which are discussed during the plea negotiations. Petitioner concedes this point. *See* petitioner's Petition at p. 9.

Petitioner's sole claim is that the trial court should have conducted an evidentiary hearing regarding the scope of plea negotiations. In support, petitioner cites various cases wherein it has been held that hearings should be conducted to determine the voluntariness of a confession, the state's refusal to appoint counsel, the possibility of a physically coerced confession, the veracity of an affidavit in support of a search warrant, and the like. However, such cases involved fundamental rights emanating from the Fourth, Fifth, or Sixth Amendments and were made ap-

plicable to the states via the Fourteenth Amendment. Petitioner attempts to equate hearings on a fundamental right with a hearing on a question of admissibility of evidence which arises, not from a constitutional guarantee, but from public policy concerns.

Petitioner also relies on a series of cases wherein this Court has required that a hearing be conducted in various situations where a civil litigant is placed in a position of being deprived of a liberty or property interest. *E.g., Sniadach* v. *Family Finance Corporation,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (where the Court held that a hearing be held prior to pre-judgment garnishment); *Armstrong* v. *Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) (where the Court held that a father must be given notice of a hearing wherein custody of his child is at issue).

Again, there is no parallel. The cases cited by petitioner deal with the requirement of a hearing prior to the deprivation of a property or liberty interest. In the present case, petitioner's trial constituted the hearing prior to the decree that he be deprived of liberty and property. He now attempts to equate hearings on the merits of an entire case with a hearing on the admissibility of evidence. A property or liberty interest cannot be equated with such a question of admissibility.

Petitioner cannot point to a single example of where, even in plea negotiation settings, a full "evidentiary" hearing is mandated by due process. Petitioner relies, in part, on *United States* v. *Robertson,* 582 F.2d 1356 (5th Cir. 1978). There, the question revolved around a determination as to whether a certain discussion constituted, in fact, a plea ne-

gotiation. However, *Robertson* never suggests that an evidentiary hearing be conducted. Rather, the trial court is charged with merely making an "inquiry" as to a defendant's "subjective expectation to negotiate a plea" and as to "whether the accused's expectation was reasonable" under the circumstances. *Robertson* does not provide the extent of such an inquiry, so long as the trial court can satisfy itself under the standards provided. Petitioner's assertion that there exists a *requirement* of an evidentiary hearing is without support. At most, the trial court is bound to make an "inquiry."

Petitioner relies on *Nardone* v. *United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). However, petitioner's reliance is misplaced. *Nardone* dealt with a situation wherein evidence had been obtained by means of wiretapping, contrary to a Congressional prohibition. On re-trial, the Government had apparently used the illegally obtained evidence to obtain additional evidence. The question presented was whether the defendant should have been allowed to inquire as to what "use" the Government had made of the illegally obtained evidence. The Supreme Court made it clear that the Congressional prohibition went not only to the use of such evidence before a court, but extended to any use whatsoever. *Nardone* dealt with the wrongful acquisition of evidence at the outset. The present case does not. Yet, it is interesting to note that the Court in *Nardone* never makes reference to the need for an "evidentiary" hearing, but only an inquiry.

Petitioner also relies on *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973), in support of his position that a hearing is required even when the prosecutor claims that

the controversial evidence came into his grasp through an independent source. *Falley* involved convictions for conspiracy to violate federal drug laws. Among the questions presented therein was whether certain evidence should be suppressed due to its alleged discovery as a result of an illegal search and seizure. The defendants had claimed that the unlawful search led to a more extensive investigation and, thus, the discovery of additional incriminating evidence. In addressing the issue, the Court of Appeals recognized that the "fruits of the poisonous tree" doctrine arising from *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), does not preclude the introduction of evidence sufficiently remote from the unlawful act. As the Court noted, "[i]t would have been only a question of time before the Government by a so-called saturation investigation, or otherwise, would have discovered the broker and the importation documents." *United States* v. *Falley,* supra at 40.

It is important to note that in resolving the issue in *Falley,* the Court of Appeals never required that a full "evidentiary" hearing be held on the question of admissibility of evidence obtained from an independent source, where that evidence might otherwise be inadmissible. Rather, the Court said that only an "inquiry" need be made as to the cause of the investigation leading to the discovery of the incriminating evidence.

In the present case, there was an inquiry. Indeed, as noted previously, the same persons who would have testified in an "evidentiary" hearing voiced their respective versions of the controversy to the court as officers of the court. Respondent submits that the *in camera* hearing in

and of itself was a sufficient inquiry as to the issues presented. There is no reason to believe that anything different would have been said had the hearing been labeled "evidentiary."

CONCLUSION

Respondent submits that petitioner cannot show a substantial federal question in light of the *in camera* hearing, the parties involved in the hearing, and the total lack of prejudice in view of the fact that the evidence in question supported petitioner's theory of defense. Wherefore, respondent State of Oklahoma respectfully urges this Honorable Court deny petitioner's request for writ of certiorari.

Respectfully submitted,

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Attorneys for Respondent

October, 1980

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

I, Danny K. Shadid, depose and say that I am an attorney in the office of Jan Eric Cartwright, Attorney of record for the State of Oklahoma, respondent herein, and that on October _____, 1980, pursuant to Rule 33 of the Rules of the Supreme Court, I served three (3) copies of the foregoing brief by mailing the copies in a duly addressed envelope, with first class postage prepaid, to the following:

Stephen Jones
P. O. Box 3339
Enid, Oklahoma 73701
Attorney for Petitioner

All parties required to be served have been served.

_____
Danny K. Shadid

Subscribed and sworn to before me this _____ day of October, 1980.

_____
Notary Public

My Commission Expires:

_____

APPENDIX

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
v.	)	Case No. CRF-77-3144
HENRY EARL SHRIVER, Defendant.	)	

AFFIDAVIT OF ANDREW M. COATS

STATE OF OKLAHOMA	)	
	)	SS:
COUNTY OF OKLAHOMA	)	

Andrew M. Coats being first duly sworn upon his oath deposes and says:

1. I am the District Attorney of Oklahoma County, District No. 7, State of Oklahoma.

2. I was the lead counsel in the trial of the above captioned matter.

3. In preparation for trial of this matter and on Tuesday, the 7th day of February, 1978, I had a conference with Roy Melton who was to be a witness for the State. At that meeting, I asked Mr. Melton to tell me of every time he received any money from the defendant, Earl Shriver. Mr. Melton told me that he had received a loan from Mr. Shriver in 1969; that he had received $800.00 in cash in February, 1977; and that he received a $1,500.00 loan from Mr. Shriver in June, 1977. This was the first information I received about a $1,500.00 loan from Earl Shriver to Roy Melton in June of 1977. This information was obtained from Roy Melton in preparation for trial.

The question was asked primarily because at the Preliminary Hearing in this matter Mr. Stephen Jones, attorney for the defendant, had asked Mr. Melton on cross-examination about the loan of money from Shriver to Mel-

ton in 1969 and when the witness was not sure about the loan had produced a signed note evidencing such loan. In order to be sure that the State presented to the Court and jury all of the facts about the dealings between Melton and Shriver, I felt it was my duty to present not only the $800.00 cash payment from Shriver to Melton which the State considered was a bribe but also the two transactions which Melton and Shriver described as loans. These transactions were confirmed by Mr. Shriver in his testimony at trial as shown by the excerpts from the transcript of testimony presented herewith. I did not receive information concerning this $1,500.00 transaction between Shriver and Melton in June of 1977 from any other source.

4. At the trial of this matter and after I had asked Mr. Melton to list all of the transactions which he had had with Mr. Shriver, Mr. Jones interposed an objection and asked for an *in camera* hearing. At the *in camera* hearing, Mr. Jones asserted his claim that he had entered into some sort of agreement in regard to this June, 1977, transaction with Assistant District Attorneys Larry E. Joplin and James P. Laurence and with Oklahoma City Police Department Detectives Kenneth R. Smith and Charles Acox. After the hearing, I conducted an investigation to determine whether there was any truth to his assertions. I determined that no discussions were ever had by Mr. Jones with any of the above listed persons or any other person I could find in regard to a loan transaction between Shriver and Melton in June of 1977. I concluded, therefore, that Mr. Jones' allegations then and those which now appear in Paragraph 19 of the Motion for New Trial had and have no basis in fact. Therefore, I considered it proper to inquire about these matters from Mr. Shriver on cross-examination as shown by the excerpts from the transcript attached hereto.

(s) *Andrew M. Coats*
ANDREW M. COATS

[Certification omitted in printing]

[Caption omitted in printing]

AFFIDAVIT OF JAMES P. LAURENCE

STATE OF OKLAHOMA)
) SS:
COUNTY OF OKLAHOMA)

James P. Laurence being first duly sworn upon his oath deposes and says:

1. I am an Assistant District Attorney for District No. 7, Oklahoma County, State of Oklahoma.

2. I was assigned to prepare for the trial of the above-captioned matter.

3. On February 3, 1978, a conversation was held in my office with Mr. Shriver's attorney, Stephen Jones, in regard to information required under a court discovery order and possible plea negotiations. During the course of this conversation, Assistant District Attorney Larry E. Joplin and Oklahoma City Police Department Sergeant Charles Acox joined Mr. Jones and me in my office. Mr. Jones informed us that Mr. Shriver would be interested in entering a plea in either a misdemeanor or to the felony charge with a recommendation for deferment of sentencing. Mr. Jones indicated that Mr. Shriver would then cooperate with this office in further investigation of the Oklahoma County Assessor's Office. Mr. Jones told us that Mr. Shriver could supply the "key" which would unlock the bribe scheme. Mr. Jones also said that Mr. Shriver could give us information relating to the involvement of other county officials; however, Mr. Jones did not specifically state that this information would relate to wrongdoing on the part of any one individual, only that the information would relate to the general scheme and how it operated in the Oklahoma County Assessor's office.

4. Mr. Jones told us that Mr. Shriver had paid a bribe to Roy Melton from some people in Little Rock, Arkansas

for tax considerations, that this payment had been by check, and, therefore, could be confirmed. Mr. Jones did not indicate whether this check came from the people in Little Rock or some other source and did not show it to us. Larry Joplin and I agreed not to use any information revealed in this conversation concerning this Arkansas bribe transaction in the case pending against Mr. Shriver.

5. During the week of February 6, 1978, a conference was held in Mr. Coats' office with Roy Melton. At this conference, Mr. Melton indicated that he had borrowed $1,500.00 from Mr. Shriver in May or June of 1977, and the payment was made by check. He said the purpose of the loan was to redeem tax certificates on property which he owned in Canadian County, Oklahoma. Mr. Melton indicated that this loan had been repaid. Mr. Shriver confirmed in his testimony that he had loaned Mr. Melton $1,500.00 in June of 1977.

6. I did not at anytime receive any information from Mr. Jones in regard to the $1,500.00 loan made by Mr. Shriver to Mr. Melton in June of 1977 and made no agreement with him in regard to that loan transaction.

(s) *James P. Laurence*
JAMES P. LAURENCE

[Certification omitted in printing]

[Caption omitted in printing]

AFFIDAVIT OF LARRY E. JOPLIN

STATE OF OKLAHOMA)
) SS:
COUNTY OF OKLAHOMA)

Larry E. Joplin being first duly sworn upon his oath, deposes and says:

1. I am an Assistant District Attorney for District Number Seven, and on February 3, 1978, I was present in James Laurence's office for a conversation with Mr. Laurence, Stephen Jones and Charlie Acox. During this conversation, Mr. Jones indicated that his client had information regarding bribery in the Oklahoma County Assessor's office. Mr. Jones said he would give us certain information to show his good faith in plea bargaining if the information would not be used against his client in his upcoming trial scheduled for February 8, 1978. I stated that it wasn't my case and of course I would not use it, but that he would have to talk to Mr. Laurence about that. Mr. Laurence said he wouldn't use it because he was ready for trial and didn't need anymore information on this charge.

2. At that point, Mr. Jones said that his client had acted as the pay-off man for a group of Little Rock, Arkansas businessmen who had bribed Roy Melton for certain tax benefits and that this could be proved by cancelled checks.

3. Shortly after this, I left Mr. Laurence's office. I never communicated this information to the District Attorney and have no knowledge of any $1500 transaction in June of 1977.

(s) *Larry E. Joplin*
LARRY E. JOPLIN

[Certification omitted in printing]

[APPENDIX]

[Caption omitted in printing]

AFFIDAVIT OF KENNETH R. SMITH

STATE OF OKLAHOMA)
) SS:
COUNTY OF OKLAHOMA)

Kenneth R. Smith being first duly sworn upon his oath, deposes and says:

1. I am a Lt. Detective with the Oklahoma City Police Department and have been so at all times pertinent herein.

2. On or about the 5th day of February, 1978, I had a conversation with Mr. Stephen Jones at his hotel regarding the case of The State of Oklahoma v. Henry Earl Shriver. Mr. Jones was asking us to ask the District Attorney to recommend a deferred sentence for Mr. Shriver. In return for our help, Mr. Jones stated that Mr. Shriver could furnish us a lot of information about transactions and dealings with the Oklahoma County Assessor's Office. The only other person in attendance at this meeting was Sergeant Charles Acox of the Oklahoma City Police Department.

3. The conversation dealt with a claim by Mr. Jones that Mr. Shriver could prove that Mr. Roy Melton had accepted money on other occasions in other transactions. Mr. Jones displayed a check which he claimed constituted a payment to Mr. Melton from Mr. Shriver.

4. We did not receive any information from Mr. Jones in regard to any loan transaction between Mr. Melton or Mr. Shriver occurring in June of 1977 and could not, therefore, have made any agreement with Mr. Jones in regard to any such information.

5. I did not communicate any information I received in that meeting to the District Attorney or to any members of his staff.

(s) *Kenneth R. Smith*
KENNETH R. SMITH

[Certification omitted in printing]

[Caption omitted in printing]

AFFIDAVIT OF CHARLES ACOX

STATE OF OKLAHOMA)
) SS:
COUNTY OF OKLAHOMA)

Charles Acox first being duly sworn states:

1. I am a Detective Sergeant with the Oklahoma City Police Department and have been so at all times pertinent herein.

2. On February 3, 1978, I was present in Mr. James Laurence's office for a conversation between Mr. James Laurence, Mr. Stephen Jones and Mr. Larry Joplin.

3. Mr. Jones informed me, Larry Joplin and James Laurence that Shriver could supply the "key" which would unlock the Assessor's office bribe scheme. He informed us that Shriver could give us information relating to the involvement of other county officials. However, he did not specifically state that Shriver's information would relate the wrongdoing on the part of any one individual. It would relate to the general scheme and how it operated in the Assessor's office.

As evidence of the information that Shriver had access to, Jones informed us that Shriver had paid a bribe to Roy Melton from some people in Little Rock, Arkansas,

for tax considerations. He further stated that the payment was by check and therefore could be confirmed. There was no indication at that time as to whether this check came directly from Earl Shriver or from the people in Little Rock or from some other source. No check was offered for inspection at that time.

4. On or about the 5th day of February, 1978, I had a conversation with Mr. Stephen Jones at his hotel regarding the case of The State of Oklahoma v. Henry Earl Shriver. Mr. Jones was asking us to ask the District Attorney to recommend a deferred sentence for Mr. Shriver. In return for our help, Mr. Jones stated that Mr. Shriver could furnish us a lot of information about transactions and dealings with the Oklahoma County Assessor's Office. The only other person in attendance at this meeting was Lt. Kenneth R. Smith of the Oklahoma City Police Department.

5. The conversation dealt with a claim by Mr. Jones that Mr. Shriver could prove that Mr. Roy Melton had accepted money on other occasions in other transactions. Mr. Jones displayed a check which he claimed constituted a payment to Mr. Melton from Mr. Shriver.

6. We did not receive any information from Mr. Jones in regard to any loan transaction between Mr. Melton or Mr. Shriver occurring in June of 1977 and could not, therefore, have made any agreement with Mr. Jones in regard to any such information.

7. I did not communicate any information I received in that meeting to the District Attorney or to any member of his staff.

(s) *Charles Acox*
CHARLES ACOX

[Certification omitted in printing]

Supreme Court, U. S.
FILED
OCT 15 1980
MICHAEL RODAK, JR., CLERK

No. 80-394

In the Supreme Court of the United States

OCTOBER TERM, 1980

HENRY EARL SHRIVER,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

PETITIONER'S REPLY BRIEF

STEPHEN JONES
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Enid, Oklahoma 73701
Phone (405) 233-4321
Counsel of Record for Petitioner

October, 1980

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APPENDIX

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PETITIONER'S REPLY BRIEF

The Respondent's argument[1] that a meeting of trial counsel with the Judge in his chambers during a recess where each side presented their respective offers of proof on the question of whether the challenged evidence was being offered in violation of plea agreement negotiations was "for all intents and purposes" (Response Brief, p. 6) an evdentiary hearing (the claimed absence of which is the

[1] Other arguments made by the Respondent, *i.e.*, that the objected evidence was not prejudicial to the Petitioner are not discussed here in obedience to Rule 22, because they are discussed in the Petition for Certiorari at pages 16 through 19. Respondent has not challenged the argument or authorities set forth at pages 6 through 10 and 12 through 15 of the Petition for Certiorari.

crux of this petition for certiorari) is without legal or intellectual authority or persuasiveness for the following reasons:

One, the Respondent confuses the appropriateness of an initial judicial inquiry with the necessity for an evidentiary hearing. Not all objections require a hearing to resolve. The court must first make a preliminary inquiry to determine whether there are sufficient facts proffered so that, if the facts are proven, the movant is entitled to the legal relief requested. If such threshold burden is met, a hearing is necessary, whether the challenged evidence is an admission against interest (*Jackson* v. *Denno,* 378 U.S. 368 (1964)), evidence seized pursuant to an illegal search (*Franks* v. *Delaware,* 438 U.S. 154 (1978)), or evidence obtained in violation of a rule prohibiting the use at trial of evidence disclosed during plea negotiations. We say that due process requires such an evidentiary hearing when the offer of proof by the Petitioner would, if proven, require the trial court to sustain his objections.

Two, the Petitioner met his burden to establish the necessity for an evidentiary hearing in this case. The offer of proof was specific enough that, if accepted by the trier of fact, the evidence challenged would have to have been excluded. Likewise, if the statement of Mr. Coats, the prosecutor (which we categorize as an offer of proof although he did not identify it as such), was accepted, the evidence challenged would have been admissible. The Respondent claims that:

> "Moreover, the situation herein is somewhat unique in that three of the most crucial witnesses who would have testified in an 'evidentiary' hearing, i.e., District

> Attorney Andrew Coats, Assistant District Attorney Jim Laurence, and defense counsel Stephen Jones, were all present at the *in camera* hearing. All basically told their versions of what happened and how the $1,500.00 loan came to light. As officers of the Court, there is no reason to believe that they would have told the Court anything different if they had formally 'testified.'" (Responent's Brief, p. 6)

Such an allegation is a non-sequiter. If judges were allowed to resolve contested issues of fact when the evidence is conflicting on the oral statement of opposing advocates, the jury system would be abolished overnight.

Three, even if each attorney repeated the same statement under oath had a hearing been held, that does not foreclose the necessity for an evidentiary hearing, for two reasons. First, there were at least five other witnesses crucial to the determination of the issue (*infra*). Second, the virtue of an evidentiary hearing was the opportunity for cross-examination of Andrew Coats and Jim Laurence. "The power given to a party against whom evidence is offered of cross-examining the witness upon whose authority the evidence depends constitutes a strong test of both the ability and the willingness of the witness to declare the truth. By this means, the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally scrutinized and examined." 1 Starkie, *Evidence* 96, 129 (1824). As Dean Wigmore observed, "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing

by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." 5, Wigmore, *Evidence* (Chadburn Revision), §1367, at p. 32. The oral representations of Petitioner's counsel, Mr. Coats and Mr. Laurence, are utterly worthless in the eyes of the law as a method of determining and resolving conflicting evidence. It is precisely for that reason that courts have not permitted factual disputes on the admissibility of evidence to be resolved by the oral representation of counsel. *United States* v. *Smith,* 495 F.2d 668 (10th Cir. 1974), *United States* v. *Peters,* 625 F.2d 366 (10th Cir. 1980).

Four, there were at least five other witnesses whose testimony would have been crucial at an evidentiary hearing. These witnesses were Larry Joplin, who participated in the plea negotiations, police officers Kenneth R. Smith and Charles Acox, Roy Melton, and Deirdre Dexter. The testimony of Mrs. Dexter was of crucial importance. She would have testified that on February 5, 1978, before the commencement of the Shriver trial, she typed a memorandum to the Shriver file dictated by Shriver's counsel containing a report of his conversation with Laurence and Joplin. That memorandum (dictated and typed before the issue arose in court) established that Joplin and Laurence had told Jones that no reference would be made to the specific $1,500.00 transaction at trial.

Five, the Respondent resisted an evidentiary hearing at trial and at the Motion for New Trial. In the latter proceeding, it did offer affidavits[2] of Joplin, Laurence, Smith and Acox in opposition to a Motion for New Trial based on the failure of the trial court to grant an evidentiary hearing. The apparent willingness of the Respondent's agents to offer every type of statement, except one on a witness stand, under oath, and subject to cross-examination is surely a wonder. The State's affidavits were not even shown or given to Petitioner's counsel prior to the commencement of the hearing for the Motion for New Trial. Subsequently, Petitioner's counsel filed with the trial court

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[2] The apparent unwillingness of Mr. Coats and his Assistants to take the stand and their sensitivity to the subject of whether they may have violated Mr. Shriver's rights, is nowhere more aptly demonstrated than in supercilious Motion to Censure Petitioner's Counsel and Motion to Strike because he raised the issue in paragraph 19 of Defendant's Motion for New Trial. Mr. Coats alleged that paragraph 19 "contains scurrilous, defamatory and intentionally misleading statements. The making of these statements by counsel for the Defendant (Petitioner) constitutes unprofessional conduct and is wholly unwarranted under the facts and circumstances herein." The court did not sustain either Motion to Strike, filed March 17, 1978. In fairness to Mr. Coats, however, he did inform the court in writing that Petitioner's counsel "should be permitted the opportunity of withdrawing the accusations made therein (paragraph 19 of the Motion for New Trial). Should he fail or refuse to do so, he should receive a public censure and reprimand for this highly improper and unprofessional conduct." Motion to Censure, filed March 17, 1978. This recitation is presented to the Court so that should the Court desire to examine carefully the affidavits submitted as a part of the Appendix to the Brief in Opposition, the Court might be more fully advised of the personal feelings and circumstances that motivated Mr. Coats to make such statements. Obviously, he was not personally indifferent to a successful prosecution of Petitioner. All the more reason to test the statements made by him and his Assistants under oath and subject to cross-examination.

a detailed Response to the affidavits with accompanying exhibits and counter-affidavits, estabishing that the State's affidavits were internally inconsistent, contradictory and, in fact, in some important and crucial respects corroborated the statements contained in Petitioner's offer of proof. For some reason, the Respondent has neglected to call the Court's attention to this portion of the record or to reproduce it in its Appendix. For the Court's convenience, it is included in our Appendix along with a copy of Deirdre Dexter's affidavit and the memorandum to the file dated February 5, 1978, all of which appeared in the record below.

The State's affidavits "is no evidence between strangers" because "there can be no cross-examination." 5 Wigmore, *Evidence* (Chadburn Revision), §1384, p. 85. This rule is well recognized in the Federal Courts. *United States* v. *Dibble,* 429 F.2d 598 (9th Cir. 1970); *London* v. *East Feliciana Parish Police Jury,* 347 F.Supp. 132 (D.C. La. 1972), *reversed* on other grounds 476 F.2d 637. Affidavits cannot serve as proof when factual determinations are required on critical issues raised during a trial. *Locklin* v. *Switzer Brothers, Inc.,* 348 F.2d 244 (9th Cir. 1965), on remand 261 F.Supp. 582; *United States* v. *Certain Land in Borough of Manhattan,* 357 F.Supp. 1382 (D.C. N.Y. 1972).

CONCLUSION

The meeting in the trial judge's chambers was not a substitute for an evidentiary hearing. No testimony was taken under oath, no cross-examination was available, and five of the eight crucial witnesses were not even present. Affidavits subsequently filed by the State, without timely notice to Petitioner, at the hearing on the Motion for New Trial, cannot be used to resolve serious factual disputes concerning the admissibility of evidence. The affidavits, coming as they are from officers of the Respondent most intimately interested in the prosecution of the case, are self-serving. The Respondent's agents should have been required to make such testimony under oath, on a witness stand, and subject to cross-examination.

The Petition for Certiorari should be granted and the cause remanded with instructions to grant the Petitioner an evidentiary hearing at a new trial on his claim that evidence was being introduced against him in violation of the ground rules of plea negotiations.

Respectfully submitted,

STEPHEN JONES
P. O. Box 3339
Enid, Oklahoma 73701
Phone (405) 233-4321

Counsel of Record for Petitioner

October, 1980

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that true and correct copies (3) of the foregoing Reply Brief of Petitioner were served, by placing same in the United States Mail, postage fully prepaid, to all parties required to be served, to-wit: Jan Eric Cartwright, Attorney General of Oklahoma, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this _____ day of October, 1980.

Stephen Jones

APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	No. CRF 77-3144
HENRY EARL SHRIVER, Defendant.	)	

Filed in the District Court of Oklahoma County
April 5, 1978

DEFENDANT'S RESPONSE TO MOTION
TO CENSURE AND MOTION TO STRIKE

* * * *

H. *Analysis of Affidavits Supports Our Position.*

Although Mr. Coats states in his affidavit that he was not aware of the $1,500.00 except from Roy Melton, the internal evidence of the affidavit strongly suggests that in fact this is not the case. Consider: (1) Paragraph 3 of Mr. Coats' affidavit admits that he did not learn of the $1,500.00 check until Tuesday, February 7, 1978. Although undoubtedly Mr. Coats and Mr. Melton had had numerous conferences concerning this case, Mr. Coats' own affidavit proves that he had no knowledge of the $1,500.00 from Roy Melton *until after I had discussed the $1,500.00 with Mr. Acox and Mr. Smith on Sunday evening (a fact which they admit) and I had discussed it with Mr. Laurence and Mr. Joplin on Friday, February 3, 1978, (which they deny).* (2) Mr. Coats admits asking Mr. Melton "to tell me of every time he received any money from the Defendant", yet, the only times Mr. Melton mentioned were $1,500.00 from Mr. Shriver in June of 1977, a loan in 1969 and $800.00 cash in February, 1977. The 1969 loan I had brought out at the preliminary hearing, and the $1,500.00 I had already

informed Mr. Acox and Mr. Smith, according to their own admission, and I maintained had informed Joplin and Laurence. The testimony at the trial was that there were numerous transactions between Mr. Melton and Mr. Shriver including another one for which records were available and introduced. Thus, it is something more than a coincidence that although Mr. Coats asked for every transaction, Mr. Melton only told him *of the ones that Mr. Coats or his office were already aware.* (3) Contrary to Mr. Coats' suggestion, Mr. Shriver did not testify at the February trial that the $1,500.00 paid to Mr. Melton was a loan. The transcript of the testimony which Mr. Coats had transcribed shows that Mr. Coats asked Mr. Shriver, "Now, did you loan him some money then later in the year, in '77?" To which Mr. Shriver said, "That's what he testified to yesterday." Then Mr. Coats said, "I'm asking you. Did you *give* him some more money later than *May or June* of that year?" After my objection, Mr. Shriver confirmed that he did, and then Mr. Coats asked what month and Mr. Shriver said, "I believe it was in May or June." Then Mr. Coats asked him, "Did you give him any more money *during the rest of the year?*" to which Shriver said, "No, sir, I didn't give it to him, I loaned it to him." Mr. Coats implies that Shriver testified that the $1,500.00 was a loan. It is clear from the unambiguous testimony that Shriver's statements referred not to the $1,500.00 but, in fact, referred to another loan. Then Coats brings the matter back by referring to Melton's testimony, "that he paid it back." And Mr. Shriver stated, "Mr. Melton has not paid the $1,500.00 back."

Apparently the prosecution didn't understand Mr. Shriver's answers because Mr. Shriver did not testify that the $1,500.00 was a loan. Mr. Shriver would not testify to that because I had advised him that to do such could be perjury, and I had told him to be very careful and measured in his responses.

The fact of the matter is that the District Attorney permitted perjurous testimony to go to the Court because certainly Acox and Smith, (who were then working with the District Attorney on the case) already knew that the $1,500.00 was not in fact a loan. I maintain that Joplin and Laurence also knew it. But even if Coats is correct and Joplin and Laurence didn't know it, certainly Smith and Acox knew it.

(4) Mr. Coats then says, "After the hearing, I conducted an investigation to determine whether there was any truth to his assertion. I determined that no discussion was ever had by Mr. Jones with any of the above listed persons or any other person I could find in regard to a loan transaction between Shriver and Melton in June of 1977." This statement is literally true because I had not had a discussion concerning a loan transaction between Shriver and Melton in June of 1977. The discussions that I had had were with a transaction that was not a loan in any sense of the word.

(5) The Coats' affidavit was obviously prepared in haste and probably not even proofread because it has internal inconsistencies not only which represents a shift from his position in Court both at trial and at the Motion for a New Trial, but also is contrdictory to other affidavits.

I. *The Jim Laurence Affidavit.*

The Laurence affidavit, while self-serving in some respects, clearly discusses the Little Rock transaction, mentions it was by check, and further states that I did not show the check to Laurence. This statement is true because I didn't have the check with me.

Next, Mr. Laurence says that a conference was held in Mr. Coats' office with Roy Melton. Apparently, judging by the Laurence affidavit, he was present at the conference. He states that Mr. Melton indicated that he had borrowed $1,500.00 from Mr. Shriver in May or June of 1977,

and the payment was made by check. Mr. Melton indicated that this loan had been repaid. This is an outright false statement. Roy Melton never paid back any $1,500.00 loan to Earl Shriver in May or June of 1977, because there was no loan made to him and careful questioning of Roy Melton by either Jim Laurence or Andrew Coats would have demonstrated to anyone's satisfaction that there was no loan. Why didn't the State get proof from Mr. Melton that he had paid back this $1,500.00? Mr. Laurence's statement, "Mr. Shriver confirmed in his testimony that he had loaned Mr. Melton $1,500.00 in June of 1977," as we point out is absolutely inaccurate.

J. *The Larry Joplin Affidavit.*

The Larry Joplin affidavit is somewhat more to the point. However, Mr. Joplin is incorrect when he states that I would have to talk to Mr. Laurence about it because Mr. Laurence in conversation was considering Mr. Joplin's advice and it was Mr. Joplin that told me "right, right," that it (the transaction) wouldn't be used.

Mr. Joplin admits that Mr. Laurence said that the matter would not be referred to at trial but claims that this was only the Arkansas matter. What is amazing through all of this is that even though Joplin, Laurence, Acox and Smith had been told by me that Melton had received through Shriver money that might be considered a bribe or a gratuity to influence a tax assessment on behalf of a Little Rock, Arkansas, real estate syndicate, no one thought to ask Roy Melton about this. Here we have a defense attorney coming into the District Attorney's office and admitting that his client has information concerning a gratuity paid to a Deputy County Assessor on behalf of a Little Rock, Arkansas, real estate syndicate, that the client has the proof in the form of a cancelled check and no one asks Roy Melton about this transaction!

K. *Smith Affidavit.*

Kenneth Smith admits that I displayed the check to him at our meeting on February 5, 1978. Mr. Smith is correct that he did not receive any information from me in regard to any loan transaction between Mr. Melton and Mr. Shriver occurring in June of 1977, for the simple reason that I never said that it was a loan transaction.

Smith would then have us believe though that none of the information that he and I discussed for over an hour and a half concerning the investigation into the County Assessor's office, W. P. Bill Atkinson, C. A. Henderson, Jake Logan, Earl Shriver, Don Wilson or Roy Melton, was communicated "to the District Attorney or to any members of his staff."

L. *Acox Affidavit.*

Acox confirms that at the meeting on February 3rd, that the check was not offered for inspection, and this is true because I didn't have the check with me. He, again, confirms that there was a discussion concerning Little Rock, Arkansas, a payment from Shriver to Melton on behalf of Little Rock and that the payment was by check and could be confirmed. The statements contained in paragraph 6 of the Acox affidavit, I have already answered.

Acox, like Smith, denies that he communicated any of the information in that meeting to the District Attorney's office. Yet, Acox or Smith, whichever one I talked with on Monday twice, advised me in the first conversation that they had, in fact, discussed our meeting the night before with the District Attorney. In fact, when the two of them left my hotel room they told me that they had an appointment the next morning at either 8 or 9 a.m. to discuss with Mr. Coats our conversation.

APPENDIX B

MEMO

TO: SHRIVER FILE

FROM: SJ

DATE: FEBRUARY 5, 1978

On Friday February 3, 1978, I met with Jim Laurence, Assistant District Attorney, assisting with the prosecution of this cause. During a portion of the meeting Larry Joplin and Charles Acox were present. I was advised as follows:

1. The arrangement and understanding with Roy Melto is that in return for his testimony the District Attorney's office will agree to stand moot at time of sentencing.

2. I was told by both Laurence and Joplin and Acox that to their knowledge there are not electronic recordings or surveillance of Henry Shriver.

3. In plea bargaining the case, I discussed with them our willingness to enter a plea to two misdemeanors in return for complete and total cooperation, I advised them that Mr. Shriver was innocent of this charge, and that the State's prosecution of him would be prejudiced to good order, in that he knew the manner in which others had secured they were not entitled to and could explain it in the sense that if a person could explain a code, all documents would automatically be decoded. Jim Lawrence asked me who Earl Shriver could give them that to begin with Don Wilson, I also explained that Melton had not been forthcoming. They then asked what specific information Shriver might be willing to give, and I told them that I had something specifically in mind that I could tell them, but I would not tell them unless it was with assurance that it was not to be brought out in trial or referred to in any way, and that no other use would be made of the information. After some exchanging of glances, among them Larry Joplin finally said, "All right, you have our word."

and I said, "you mean your word that it will not be used in trial, won't be referred to in and no other use will be made of it", and he said, "right, right". And Lawrence said it may be something I already know, and I said if that's the case, then if I tell you now you can't use it, is that okay? and he said yes that's okay. I then told them that Roy Melton had received from Earl Shriver as a go-between on several occasions money paid by check and that one occasion was $1500.00 that was paid by a real estate syndicate in Little Rock, Arkansas to influence the lowering in assessment of taxes on property owned by this group in Oklahoma City. At that point, Acox said, Larry we have got to talk about this. I told them that there were more than just the one $1500.00 instance, but that those others were part of the same transaction. They said they understood and would be in touch with me. Before I left I told Acox where I could be reached, and he again told me or said to Larry Joplin, Larry we need to talk about this.

APPENDIX C

County of Garfield)
) S.S.
State of Oklahoma)

AFFIDAVIT

DEIRDRE DEXTER, of lawful age, being duly sworn, states upon her oath as follows:

1. I am employed as a secretary in the office of the Enid lawfirm of Jones and Gungoll.

2. On February 5, 1978, a Sunday, I worked in the office typing numerous documents and papers for Mr. Jones before he left for Oklahoma City that day for the Shriver trial.

3. I have examined what is attached to the Defendant's Response to Motion to Censure and Motion to Strike, a memorandum to the Shriver file dated February 5, 1978. I typed this memorandum myself on February 5, 1978 from a dictating belt from Mr. Jones' office.

4. I remember this particular incident because it was a Sunday, and there was quite a bit of dictation to do.

FURTHER AFFIANT SAITH NOT.

(s) *Deirdre Dexter*
Deirdre Dexter

"Acknowledgment Omitted"

[Appendices B and C here were filed in the District Court of Oklahoma County below on April 5, 1978 as a part of Appendix A.]